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The Commission on Proceedings Involving Guy Paul Morin



REPORT
Volume 2

The Honourable
Fred Kaufman, C.M., Q.C.

1998

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V

The Investigation by Durham Regional Police and the Prosecution of Guy Paul Morin

A. Introduction

In Chapters II, III, and IV I discussed forensic evidence, jailhouse informants and the investigation by the York Regional Police force. Though I was mindful of the totality of the evidence in making any findings, each of the chapters permitted some discrete treatment. These chapters corresponded in content to Phases I (Jailhouse Informants), II (Forensic Evidence) and III (the Investigation by the York Regional Police force) of the Inquiry, although, as I earlier noted, for the purposes of the Report I chose to commence with the forensic evidence.

At the Inquiry, Phase IV addressed the investigation by the Durham Regional Police Service. Phase V addressed Trial Issues. Not surprisingly, there was much overlap between the two phases, given the fact that the Durham investigation resulted in Guy Paul Morin's arrest and prosecution. Put another way, the investigation extended through Guy Paul Morin's arrest until his conviction at the second trial. It is, therefore, advantageous to address both the investigation and the prosecution of Guy Paul Morin in this chapter. Of course, to the extent to which investigative or trial issues relating to jailhouse informants or forensic evidence have been dealt with, those subject matters will not be revisited here.

B. Body Site Evidence

(i) Discovery of the Remains of Christine Jessop

On December 31, 1984, Frederick Patterson and his two young daughters were out for a walk along a tractor path south of the Fourth Concession of Brock Township, just west of Durham Regional Road 2, when they made a grisly discovery. The temperature that afternoon was about 35 degrees Fahrenheit, there was very little wind, the ground surface was dry, and the sky was overcast. The Fourth Concession, also known as Brock Concession Road 4, runs east and west. A rutted tractor path leading into the field from the Fourth Concession, curved in a way which precluded anyone who was walking along the path from seeing what was on the other side of the bend. The area to the west of the tractor path, as one walked south from the Fourth Concession and leading up to a clearing in which a trailer was permanently parked, was grassy, lightly wooded, and interspersed with cedar trees and growth. As the Pattersons walked along the tractor path they spotted what initially appeared to them to be garbage approximately 25 feet from the west edge of the tractor path. The trailer, which had been put there by the owners of the property, was approximately 60 to 70 feet from the site of this 'garbage.' The Pattersons, who were neighbours, went to the trailer to see if anyone was there. It was unoccupied and it appeared someone had broken into it.

Mr. Patterson and his daughters then walked along a trail in the grass towards the site of the 'garbage.' The grass adjacent to the beaten down pathway was approximately 1½ feet tall. As they came closer to the site, Mr. Patterson realized that they had come upon the remains of a child. Although he had walked along this property a number of times between October 3, 1984 and December 31, 1984, this was the first time he had noticed the remains. The police were called.

Sergeant William Scott and Constable Rick Keeler arrived at the nearby Patterson residence between 1:15 and 1:20 that afternoon. They were met by Mr. Patterson, who accompanied the officers to the location of the body.

The remains were identified as those of Christine Jessop. Her body was on its back and decomposed. Her legs were spread apart in an unnatural

position and her knees were spread outward. Animals appeared to have eaten at the legs. Her head was pointed north and her feet south. A sweater was pulled over her head. A few bones were scattered between her head and what remained of her legs, giving the appearance that her head and waist were not connected.

The victim was wearing a beige turtleneck sweater, a blue pullover sweater, a blouse on which some buttons were missing and two pairs of socks. Her panties were found at her right foot. Blue corduroy pants with a belt and a pair of Nike running shoes were found just south of her feet. These clothes were subsequently identified as belonging to Christine. Her school recorder, with her name still taped on it, was found next to her body. The hand-knitted blue sweater with the zippered front and no collar, which she was last reported wearing, was not found on the body; nor was it ever located.

(ii) The Initial Search of the Body Site

At approximately 1:30 that afternoon, Officer Keeler parked his cruiser at the point where the tractor path met the Fourth Concession; he remained at this entrance to ensure that no unauthorized persons came upon the scene. Meanwhile, Sergeant Scott called the Criminal Investigation Bureau of the Durham Regional Police Service and asked them to attend the site. Shortly before 2:00 p.m., Detective Bernie Fitzpatrick arrived at the scene, accompanied by Detective Peter Moore.

The identification officer, Sergeant Michael Michalowsky, arrived at 2:10 p.m. in the identification van. Mounted on the identification van was an extendable telescopic light. There were four quartz halogen lights built into the underside of the van which could be activated to cast a light out while the van's motor was running. This light, however, was not adequate for a detailed search of the area as darkness approached, but only assisted in illuminating the general area in the vicinity of the van. Constable David Robinet, the second identification officer at the scene, arrived at 4:32 p.m. At approximately 4:57 p.m., Officer Keeler went off duty and was replaced by Constable Sam Fox.

On December 31, 1984, Inspector Robert Brown was in charge of the Durham Regional Police Service Crimes Against Persons Squad. Inspector Brown reported to Superintendent Doug Bullock, who was the administrative officer in charge of the Criminal Investigation Branch as well as the

Intelligence Branch of the force. Inspector Brown would ultimately be in charge of this investigation from the time Christine Jessop's remains were found until April 22, 1985, when Guy Paul Morin was arrested. He wore two hats during this period: he was the administrator of the unit and also acted as case manager. As Inspector Brown said at the Inquiry, the key to homicide investigation is supervision and direction. He agreed during the Inquiry that being involved with the administration of other ongoing investigations and other duties in addition to the investigation into the Jessop death may have resulted in him being "spread a little too thin."

The Crimes Against Persons Squad at that time was comprised of six detectives who often worked in two teams of three: Detectives Fitzpatrick, Doug King and John Shephard were on one team, Detectives Reg Webster, Peter Holley and Joe Loughlin on the other. Both squads reported directly to Inspector Brown. These squads were composed of experienced and seasoned officers in the detective office who had investigated a wide variety of crimes. Inspector Brown testified that in 1984 the number of homicides per year in Durham did not warrant a fully mandated homicide squad.

Inspector Brown was the first officer of a higher rank to arrive at the crime scene. He asked Sergeant George Scott to organize a ground search of the immediate area. Sergeant Scott left the scene between 3:00 and 3:15 p.m. to arrange for additional personnel to assist in the search. He returned between 4:15 and 4:30 p.m. The Brock Fire Department was asked to bring electric lighting and generators to the area. This lighting arrived at approximately 3:45 that afternoon. The coroner arrived at approximately 4:00 p.m. More officers began to arrive in the latter part of the afternoon to assist with the search of the ground for potential evidence.

It was New Year's Eve; a severe storm was predicted for that evening. Detective Fitzpatrick testified that he suggested to Inspector Brown that a tarpaulin be used to cover the area of the remains until the next day. This was not done. No tarp or tent was erected to protect the site from the impending storm. Inspector Brown determined that, considering the vegetation, tenting the area would be difficult without cutting down saplings and, perhaps, contaminating the scene further. He testified that he had discussions with the identification officers, who assured him that officers could clear the body site, before leaving, of any and all evidence that was retrievable. In fact, at the end of the day, the search was not yet complete.

Considering the inclement weather, the decision not to protect the site was imprudent, and there was insufficient time to preserve all possible evidence before the area was fully covered by snow and ice. It is to Detective Fitzpatrick's credit that he made the suggestion to take the necessary steps to preserve the site so that the search could be continued the following day and, I am sure, it must be a matter of regret for Inspector Brown — indeed, he said so — not to have followed Fitzpatrick's advice. I understand that making arrangements of this kind is not always easy, and getting a tent on New Year's Eve might have been difficult, if not impossible. But even a tarpaulin would have gone a long way to protect the ground. Unfortunately, this was not done.

The small clearing surrounding the remains of Christine Jessop was cordoned off. This roped-off area was located approximately 45 feet west of the identification van, which was parked east of the pathway and slightly to the north. Searches for evidence both inside and outside of this roped-off area were conducted until early evening. To the west of this area, the woods became more dense and forest-like. Officers Fitzpatrick and Michalowsky attempted to clear the area between the tractor path and the body of any potential evidence by conducting a ground search on their hands and knees. During this search, they found two pearl buttons to the west edge of the laneway which were subsequently identified as coming from the blouse of Christine Jessop. These were photographed and placed in a plastic bag by Michalowsky.

(iii) The Removal of the Remains

At approximately 4:30 that afternoon, Durham officers placed the remains of Christine Jessop on a four-by-eight foot painted piece of plywood which had come from the Durham police laboratory for use for this purpose. Sergeant Michalowsky used a shovel to loosen the ground around the remains. Officers attempted to slide the board under the body and balled clothing surrounding it in order to interfere with the remains as little as possible and gather some of the soil surrounding the remains. The head portion of the body was placed on the board, separate from the torso. The officers found it necessary to lift up various parts of the body while physically attempting to 'shimmy' the board underneath the remains. In the process, the skeletal remains were not placed in precisely the same position as they were when they were lying on the ground. While every effort was made to be as careful and precise as possible, Sergeant Michalowsky testified during the

first trial that some rib bones had been beyond the width of the board and had to be picked up and placed on the edge of the board by hand.

No measures were taken to prevent officers' hair and fibres from their clothing from falling on the remains during this process. Inspector Brown could not recall whether or not the officers were wearing scarves or gloves, though he did state that rubber gloves would have been an excellent idea. The body was not covered.

The plywood board, on which the body and surrounding earth had been placed, was moved into a van originally sent to transport the remains. Unfortunately, six inches of the board extended outside of the rear of the van, making it impossible to close the doors. A second vehicle, which could accommodate the full length of the board, was then called to the scene. In the meantime, members of the media began to arrive. An officer took white sheets and put them over the exterior portion of the van to block anyone's view of the remains. The second vehicle, a traditional funeral hearse, containing the remains of Christine Jessop, left the scene at 6:33 p.m. for the Coroner's Building in Toronto.

(iv) Search Instructions for Officers

While this took place, officers continued to arrive from points as far as Oshawa, Whitby, Ajax, Port Perry and Pickering. They arrived from 4:15 onward, and some came as late as 5:22 p.m. There was urgency to the search because darkness descended early at that time of the year and heavy snow was expected.

An officer was stationed at the edge of the tractor path, near the roadway, to control access and to keep track of who was going to and coming from the body site. As officers arrived for the search, they were generally briefed on their duties by this officer. Some of them testified that they were instructed to ensure that no loose clothing or anything that could be dropped or fall out of their pockets was taken into the search area in order to preclude contaminating the scene. Others did not remember receiving any instructions. From that point, officers were told to see a sergeant near the body site who gave them further details and assigned them to search specific areas.

Inspector Brown testified that no grid search was done, either at the immediate body site or in the adjoining area. Efficient grid searches are

conducted with pegs and twine dividing up the area into square yards (or similar units of measurement). Everything found within a square is catalogued and recorded numerically. This was not done on December 31, 1984; Durham did not do grid searching at that time. In hindsight, Inspector Brown agreed that it should have been done, and while I understand that most police departments now employ this method in searches of this kind, this should be standard procedure. That way, no area is likely to be left unsearched, and items found can be located on a grid map, thereby avoiding uncertainty or faulty measurements or recollections.

Instead of a grid search, officers lined up shoulder to shoulder and were instructed to crawl in as straight a line as possible. But it was difficult to maintain that pattern because of the terrain in the area, and often the nature of the vegetation required greater or lesser separation. Officers were also told that should they find anything which might be of value to the investigation, they were to notify the nearest identification officer at once. Nothing was to be touched, and Sergeant Michalowsky, the identification officer in charge, would document the find, photograph it, and take control of the item by bagging and tagging it.

Searchers were instructed not to enter the roped-off area around the body. The search was broken into segments surrounding the remains. While artificial lights were brought in to illuminate the general area, officers still had difficulty seeing the ground as they proceeded on their hands and knees through the long grass. Some officers used flashlights. The searching continued until approximately 6:00 p.m. when the area was in darkness.

Several items of potential evidence were apparently found on December 31, 1984. These included a cigarette butt, a milk carton, a service station credit card receipt, a broken plastic cup, and a piece of carpeting. Sergeant Michalowsky testified that while he photographed items found at the scene, he did not keep a record of photographs that were taken. Details about some of these items and issues surrounding them will be discussed later in this section.

The identification officers, Sergeant Michalowsky and Officer Robinet, left the scene at 6:37 that evening, apparently because of problems they were having with their lighting equipment. This equipment was in a state of ill-repair and was not functioning properly. Officer Robinet testified that when they left the scene, they had *not* done a thorough search of the inner

perimeter of the roped-off area where Christine Jessop's body had been found. They intended to return the following day to continue the search. Other officers testified they were not satisfied with the thoroughness of the search of areas *outside* the roped-off area.

On New Year's Eve and in the early hours of January 1, 1985, the storm that had been predicted for the region hit with full force. Rain, sleet, ice and approximately six to eight inches of snow blanketed the crime scene.

On January 1, 1985, several officers met at the police station in Sunderland, a short distance from where the remains were found, to proceed to search the body site, as previously scheduled for that day. Unfortunately, since the snowstorm had covered the crime scene with ice and snow, the search was canceled and the officers returned to their respective divisions.

(iv) Sergeant Michalowsky

Background

Sergeant Michael Michalowsky was the chief identification officer at the Durham Region Service and reported to Inspector Brown. He joined the ranks of the Oshawa Police Force on March 1, 1957. He completed his identification course at the Ontario Police College in Aylmer in 1972 and became an identification technician with the Durham Regional Police Service. He took a number of different courses and seminars on various subject matters concerning identification, investigating sudden deaths, homicides and photography. In 1972 he was employed as a full-time identification technician with the Durham Police and served in that capacity until September 19, 1983, when he assumed the responsibilities of officer-in-charge of the Identification Branch of the Service. It was in this capacity that Sergeant Michalowsky was called to the scene when the remains of Christine Jessop were found. Sergeant Michalowsky remained with the Identification Branch until after the first trial in the *Morin* case in 1986. He then transferred to the Youth Bureau of Durham. He left the police force sometime in 1990 because of health concerns.

In March 1990, during the preparatory stages for Guy Paul Morin's second trial, Crown attorney Susan MacLean learned that Sergeant Michalowsky had two notebooks for the Jessop investigation, containing a

number of divergent entries for the same events. The second notebook was apparently made after Sergeant Michalowsky testified at Mr. Morin's preliminary inquiry.

Following an investigation by the Ontario Provincial Police, Sergeant Michalowsky was charged with perjury and related offences in connection with his evidence at the first trial relating to his notebook and to his evidence that a cigarette butt tendered as an exhibit at the first trial was the one found at the body site. These charges were judicially stayed in 1991 for reasons relating to Sergeant Michalowsky's health. These facts will be discussed in greater detail later.

Identification Duties

The Identification Branch was a separate unit of the Durham Regional Police Service. As of December 1984 the five officers who were members of the unit reported to their supervisor, Sergeant Michalowsky.

An identification officer attends a crime scene to handle and package exhibits, take measurements, create scaled diagrams to mark the location of items found, take photographs, and ensure the continuity of all such evidence collected. Continuity involves the control and maintenance of an item that is seized. It requires establishing the chain of who handled the item, from its discovery to its ultimate presentation in Court. Sergeant Michalowsky was the officer primarily responsible for ensuring the continuity of exhibits in this investigation. Establishing continuity depended on proper record-keeping.

In the course of investigations, the submission of exhibits to the Centre of Forensic Sciences was not exclusively the province of the identification department. Any police officer could submit what he or she thought to be appropriate for CFS analysis; just because an exhibit was seized at a crime scene did not necessarily mean it was submitted to the CFS.

At Mr. Morin's second trial the defence raised issues concerning the recording, the handling, the continuity, the preservation, and the submission for testing of evidence in relation to various items found at the body site. This is more fully discussed later in this section.

Durham Laboratory Conditions

Aside from those exhibits seized at the body site that were taken directly to the coroner's office or to the Centre of Forensic Sciences, Durham Region stored exhibits in their forensic identification unit. Officers testified that these facilities were unsuitable for a police force of this size.

In 1985 the Durham identification office and laboratory were located at the southwest section of the police building in Oshawa. A darkroom was set up beside the office, where photographs were developed. Much of the laboratory's work involved fingerprint examination. Clothing collected at the scene that was damp was air-dried in the room. In fact, this laboratory was essentially one large open room measuring approximately 20 by 22 feet with a 16-foot ceiling. One entered the laboratory by an east door which was generally kept locked. On the south side of the room was a wall with a large counter where fingerprint examinations were performed. A grid and fan cleared fumes and fingerprint powder from the room. To the west of the grid and fan area was the counter top used for packaging exhibits. Directly above that counter was an area where each identification officer stored exhibits, accessible by a ladder. Identification officers stacked their exhibits on this open metal shelving above the counter which was approximately four feet wide and extended the full 22-foot length of the lab. It was not secure in the sense that there were no doors on the storage area itself.

At that time, any Durham officer could sign out a particular exhibit if he or she so chose. If an officer required an exhibit, he or she would attend at the laboratory with an identification officer who would open it by key. There was no sign-in/sign-out requirement to log and keep track of these visits. Whether in practice the key was utilized only by the identification officer is uncertain, but the protocol was that the identification officer retained this key. There were no written directives regarding this process at the time.

Numerous cases of all kinds were worked on in this laboratory, often simultaneously. Different examinations, some involving chemicals, occurred in this same room. More than one identification officer would sometimes be working at the same time in the laboratory. Work might well be going on while potential exhibits were hanging to dry. Some days were more problematic than others and on all days the identification officers did their best to avoid contamination, but it was a difficult situation in which to work

— a situation ripe with the possibility for contamination.

Officers testified that the facilities were inadequate. There was a general lack of space, making it difficult to maintain exhibits in one area. Officer Robinet testified that an area on the floor was designated where things were placed: "They were waiting to be examined because we were lacking such space, and at times it became very overcrowded."

These overcrowded conditions were recognized in 1984. Concern was raised relating to the difficulty of ensuring the integrity of exhibits or absence of contamination in relation to physical exhibits as too many functions were taking place in the same room. Inspector Brown conceded that contamination could occur given the circumstances.

Lab coats were available for individuals to wear while in this area; some did and some did not. There were no regulations requiring officers to wear them.

Perhaps even then, but certainly now, more than 13 years later, these arrangements seem primitive and they were. But I am pleased to note that the Durham authorities took cognizance of this fact and the Identification Branch is now housed in appropriate quarters, with modern equipment and better security.

Sergeant Michalowsky testified at the stay motion that he and Officer Robinet were the only identification officers working at Durham the weekend of December 31, 1984, because of the holiday season. This fact becomes important in considering the evidence of Constables Jean-Paul Nadeau and Jeffrey Hewett in relation to their conversation with an identification officer on that New Year's Eve, and this will be discussed further in this chapter.

After leaving the crime scene on December 31, 1984, Michalowsky and Robinet returned to the Durham laboratory with plastic bags containing the corduroy slacks, panties, the recorder and its bag, and the running shoes found in the vicinity of Christine Jessop's body. Sergeant Michalowsky testified at the first trial and the stay motion that upon returning to the laboratory, he removed these items from their plastic bags, hung up the clothing to dry, and ensured that brown wrapping paper was placed underneath to preserve any fibres that fell from it. At the first trial, he said nothing in his testimony about receiving any assistance in these tasks from

Officer Robinet. At the stay motion he testified that Sergeant Robinet *may* have assisted in carrying the items into the laboratory, but could not recall whether he assisted in hanging them up. These items were dry by January 4, 1985, at which point they were photographed, wrapped in the paper over which they hung, tagged, placed in paper bags and forwarded to the CFS for analysis.

Necklace Hair

Sergeant Michalowsky attended the autopsy in Toronto on January 2, 1985. At this time, a chain was removed from around the victim's neck area by the pathologist. Michalowsky testified that the chain was embedded in flesh. The necklace hair, discussed at some length in Chapter II, was one of the hairs also embedded in the chain and flesh. Michalowsky donned a pair of rubber gloves, started at one end of the rolled flesh around the chain with a scalpel blade and separated the flesh from the hair. He placed the hairs in a sealed paper envelope and tendered it to the CFS for analysis. When asked during the first trial why he had removed the embedded hair instead of providing the entire chain to the Centre, he testified that he felt capable of taking it off and knew that the necklace was required by the investigative team so it could be identified by the Jessops.

I pause to reflect on the fact that Sergeant Michalowsky appeared to have no difficulty in separating the necklace from the decomposed flesh which surrounded it — surely an unpleasant, if not gruesome task. Of course, identification officers regularly attend autopsies and they, as much as the pathologist and staff, acquire some measure of immunity from sights and smells which others might find very upsetting. It was argued by counsel for Mr. Morin, with some justification, that it was difficult to reconcile Michalowsky's choice to perform this task with his later assertions, in the context of Mr. Morin's second trial proceedings, that his trauma over seeing Christine Jessop's remains made him unable to think about the case.

On January 2, 1985, Dr. John Hillsdon-Smith, the chief pathologist who conducted the post-mortem on Christine Jessop, turned over all of the victim's clothing to Sergeant Michalowsky. Michalowsky brought a blue and white pullover, a turtleneck, a blouse and two pairs of socks to the Durham laboratory. These items were also hung to dry. Again, brown kraft paper was placed on the floor under the clothing to catch and preserve any debris. When everything was dry, Sergeant Michalowsky photographed and examined the

clothing, wrapped it in the kraft paper and delivered it to the Centre of Forensic Sciences.

(v) Return to the Body Site

On January 3, 1985, Sergeant Michalowsky and another officer returned to the area of the body site with propane tanks and torches. They used this equipment to melt the snow in the roped-off area. There is no notation that any evidence was found on that date.

The following day, Sergeant Michalowsky and another officer again returned to the body site to complete the task of melting the snow and ice in the immediate area in an attempt to find additional evidence. Two bones were found which apparently were never submitted to the CFS. An issue concerning the continuity and preservation of these bones was, again, part of the challenge by the defence to the integrity of all of the evidence with which Sergeant Michalowsky had been involved.

Sometime after this discovery, Inspector Brown had a conversation with Sergeant Michalowsky about these additional bones. It was decided that Sergeant Michalowsky would re-attend the crime scene as soon as practicable in the spring when the weather had changed and the ground had cleared to do a thorough search. This would, however, be some three months after the body was discovered. Inspector Brown agreed during the Inquiry that the efficacy of an investigation where officers were sent back to the site three months after the discovery to look for evidence was indicative of "not a very efficient homicide investigation."

(vi) The Importance of the Smoking Paraphernalia

It was uncontested that Guy Paul Morin was not a smoker. Accordingly, evidence that the perpetrator was a smoker would support his innocence.

During the first and, to a greater extent, the second trials, the defence focused on the evidence found at the scene which, arguably, supported the inference that the perpetrator had left behind smoking paraphernalia: a cigarette butt or butts, a lighter and possibly a cigarette package. The prosecution, in turn, took the position that these findings were irrelevant to

the identity of the killer and, indeed, could be explained, in large measure, by searchers leaving items at the scene.

At least one cigarette butt, and possibly a second, was found at the body site on December 31, 1984. At the first trial, Michalowsky testified that two photographs of a cigarette butt introduced through him were of the same butt taken at different times. That evidence was later discredited; the Crown conceded at the second trial that the photographs were not taken in the sequence described by Michalowsky and that one of the photographs did not depict the same cigarette butt, but another object. (The Crown also conceded that the cigarette butt actually introduced into evidence at the first trial was not the butt found at the scene.) There was also evidence from Constable Patrick Holtorf, dealt with below, that suggested that the object depicted in the other photograph was only birch bark which he found at the scene, and not another cigarette butt. Serious issues were raised as to the accuracy of that account.

As well, Sergeant Kenneth Hudson was alleged to have told the OPP investigating Michalowsky in 1990, that he (Hudson) found a cigarette package at the scene. He later did not adopt that position, but suggested that he may have seen a milk carton instead. Michalowsky, in a second notebook, attributed the finding of a milk carton to yet another officer who, however, denied that he found anything at the scene.

Detective Sergeant Holley (now Inspector) found a cigarette lighter at the scene several days after the initial search at the site. He bagged this lighter and said that he turned it over to Michalowsky. Officer Hewett later claimed that he had dropped it at the scene on December 31, 1984, and so advised an identification officer shortly after his return to the station. There was evidence that Hewett had booked off duty before the identification officers returned to the police station from the body site. There was also evidence that the lighter may have been found in a different location than that in which Hewett was searching. Those differences, however, narrowed as the proceedings progressed. Various aspects of the evidence changed somewhat through time. Michalowsky also denied that he received any lighter from Holley. The lighter was never produced.

I note at this point that the smoking paraphernalia found at the scene may have had absolutely nothing to do with the identity of the perpetrator. Its significance, in this Report, has more to do with how the authorities dealt

with any perceived problems in the case against Guy Paul Morin, once the smoking issue had been raised. This bears upon the quality of the investigation and also upon the quality of the testimony which was elicited from the officers who were confronted with this issue at trial.

(vii) Smoking and the February 22, 1985 Interview

Inspector Shephard and Detective Fitzpatrick interviewed Guy Paul Morin for the first time on February 22, 1985. Detective Fitzpatrick asked Morin whether or not he smoked. He replied that he did not. Detective Fitzpatrick then asked "Do you mind if I do?" Detective Fitzpatrick testified that he had no intention of trying to find out if Mr. Morin smoked; he was simply being polite. Inspector Shephard testified that he did not know on February 22nd that a cigarette butt had been found at the scene. Both Inspector Shephard and Detective Fitzpatrick claimed they had no real interest in whether or not Mr. Morin smoked. By contrast, Inspector Shephard's notes of the February 22nd interview included the phrase "doesn't smoke" in quotation marks. On the stay motion, Inspector Shephard was asked why he put this in quotations:

> Q. Is there any explanation you can give us for that answer, "Doesn't smoke," being in quotes other than the fact that you were aware on February 22nd, 1985 that there were cigarettes found close to the body and you were concerned that the killer of that body was a smoker?
>
> A. No, sir. The only reason I can say that was in quotations is because I don't smoke, I have never smoked in my life, I detest smoking, and I may very well have just jotted it down in quotations.

The questioner's point was well taken. However, I am inclined to believe that the investigators were not alive to the importance of the presence of the cigarette butt(s) at the body site on February 22, 1985, which, of course, is in itself a failing. Later in this Report I find that Guy Paul Morin was already regarded as a suspect by the officers on February 22, 1985. Even if the presence of the cigarette butt at the scene was not known to an investigator, it might be of potential use down the road to know whether a suspect did or did not smoke. Accordingly, Detective Fitzpatrick probably did ask the question out of politeness and Inspector Shephard probably noted the

answer without a great deal of forethought, because it might possibly have later significance.

(viii) The Lighter

Introduction

The evidence bearing upon the lighter and its origin is complicated. Accordingly, it is useful to outline it in some detail.[1] Counsel for Mr. Morin alleged that the evidence demonstrates that officers improperly altered and 'developed' their evidence relating to the lighter, with the assistance of others, to meet issues raised by the defence. It is the position of the Durham Regional Police Association, shared by certain other parties at the Inquiry, that the evidence discloses no impropriety.

Finding a Lighter at the Scene

In January 1985, Detective Sergeant Holley was asked to search the body site with a metal detector, to look for a knife or any other weapon used by the perpetrator. Holley and another officer searched the area on January 3rd and January 4th. Holley's notebook for this two-day search only reflects "Sunderland detail." Sergeant Michalowsky was in attendance at the scene on both days, melting snow and ice.

Holley testified at the Inquiry that he began his search immediately north of where the body had been located at the edge of the treed area. The ground was covered with four to five inches of snow. He described the top layer as encrusted, enabling him to walk on the surface of the snow without going through to the ground. He and the other detective conducted their search in a crude grid-like formation. They laid yellow ropes on the ground from the pathway back to the bush area to the west. The lighter which Holley later found was not located on his first 'pass down,' but rather on his second or third pass down. Since the yellow ropes were approximately six feet apart, Holley estimated that he was 15 to 18 feet from the edge of the clearing.

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[1] Counsel for Guy Paul Morin filed a chart, Exhibit 191C, entitled "The Development of the Evidence Concerning the Lighter." This represented the final version of the chart, reflecting input from counsel for the Durham Regional Police Association.

Officer Holley had first found some keys behind the trailer. A short time later, the metal detector led him to the lighter, under the hard crust of the snow, northeast of where the body was found. Holley broke through this crust with his pocket knife and began brushing snow away until he came across a disposable Bic-type lighter.

Holley picked up the lighter by its ends and examined it. He marked the spot where he had found it with a stick, put the lighter in a paper bag and brought it to Sergeant Michalowsky. He agreed in his testimony at the Inquiry that while it would have been more prudent to have left the lighter where it was for the identification officer to photograph it, he had not been given any instructions by Sergeant Michalowsky in this regard.

Unfortunately, his notes contained nothing about the lighter or its location. A supplementary report which Holley said he prepared about the search was lost prior to the second trial.

Holley's first will-say (the authorship of which was in issue, as noted below) prepared before the first trial, contained this passage:

> We were shown an area where the remains of Christine Jessop had been located. Both Det. Griffin and myself were equipped with metal detectors. We conducted a search of the area. At this time there was approximately four to five inches of snow and ice on the surface of the ground ...
>
> During the course of the search *we located a cigarette lighter, disposable type, approximately 20 feet north of where the remains of Christine Jessop were found.*" (Emphasis added.)

There was no reference to the condition of the lighter, or what he did with it.

Officer Holley testified at the Inquiry that he did not prepare this will-say and had no idea who did. I pause to note that while a will-say can be written by someone other than the prospective witness, this fact should be noted on the will-say, together with the name of the officer who prepared it. Officer Holley was not the only witness who disclaimed a will-say attributed to him. My later recommendations address this issue.

No one testified about the lighter at the first trial, nor was it raised as an issue, but it became a live issue during the stay motion prior to the second trial.

Location of the Lighter and Hewett's Search

Constable Jeffrey Hewett was a fourth class constable on December 31, 1984. As such, he was in his probationary period of basic recruit training, assigned to his mentor, Constable (now Sergeant) Paul Nadeau. It was the position of the Crown at trial that Hewett dropped a lighter at the scene, which explained why Holley found one.

At approximately 3:30 on the afternoon of December 31, 1984, Hewett and Nadeau were directed to change out of their uniforms and into work clothes to be part of the search team at the body site. Hewett put on a pair of blue overalls and his large winter uniform parka. At 4:50 he arrived at the scene with Officer Nadeau. They left at 6:10 and booked off shift at 6:55 p.m. (This time acquires some significance.) Neither Nadeau nor Hewett took notes of their search other than to detail their arrival and departure from the scene. There is no reference to a lighter in the supplementary report prepared by Officer Hewett on January 1, 1985. Officer Nadeau made no mention in his notes, his supplementary report or his will-say for the first trial of any discussion with Hewett relating to a lighter.

Officers Holley, Hewett and Nadeau testified at the stay motion, second trial and at this Inquiry, in part about the origin of the lighter found at the scene.

At the stay motion, Hewett told the Court that by the time he and Nadeau attended the scene, the search was already in progress. They walked south on the tractor path and joined a line of officers who were an arm's length apart and began crawling on their hands and knees in a ground search. The location where Hewett and Nadeau searched was relevant because the suggestion was that Hewett's lighter fell out of the breast pocket of his overalls at the body site.

Hewett and Nadeau originally both testified that they searched in roughly the same place, west of the body site. That place, however, was not where Officer Holley indicated that he had found the lighter, according to the diagram provided to him during his initial testimony at the stay motion and

according to the contents of 'his' first will-say.

Between the stay motion and the second trial, Detective Hewett's evidence differed somewhat in his description of the area in which he searched. He explained that he had some problems specifically recalling and describing the area when he first testified at the motion. He maintained that he was confused about directions, that he had only been to the site once, and that he had been affected by the scene. He testified that all of these factors contributed to his inability to remember every detail about the location of the search when he was questioned at the stay motion, and he was confused by the questions asked of him by defence counsel during the trial.

Officer Nadeau's evidence also changed after the stay motion. Both Nadeau and Hewett's evidence relating to where they had searched became more closely aligned to the area in which Holley found the lighter. At the second trial, both claimed that they had started at the tractor path, north of the body site, going south-west in an arc. Hewett testified that the prior testimony relating to directions was simply human error on the parts of both himself and Nadeau. Both said at the second trial that they were confused by the diagram of the area provided to them during testimony. Despite vigorous cross-examination by counsel for Mr. Morin at the Inquiry, both officers maintained there was no conspiracy or suggestive briefing by Crown counsel, but rather that the diagram they had utilized was confusing.

Holley's recollection of the lighter's location moved from "20 feet north of where the remains were found" (assuming that his first will-say had anything to do with him) to 25 to 30 feet north and slightly to the east of the body site (at the stay motion) to approximately 30 feet north and slightly east of the body site (in a second will-say requested by the Crown), and this was his evidence at the second trial and at this Inquiry. Holley attributed this variation, in part, to the fact that he did not write his first will-say.

Losing the Lighter: Hewett and Nadeau

Officer Hewett spent approximately 45 minutes searching. Officer Nadeau assisted in moving Christine Jessop's body into the hearse. Neither found anything at the scene. They left at 6:10 p.m. and drove back to the station.

Both Hewett and Nadeau were emphatic that Hewett did not smoke

at the body site. Hewett commonly smoked in the car while they were out on patrol. Nadeau said it was possible that Hewett smoked a cigarette in the vehicle but was unable to recollect. Hewett claimed that he had not smoked on the way to the body site, at the body site, or on the way back. He testified that before he left for the body site his lighter had been in the right breast pocket of his overalls. When he returned to 17 Division after the search, he noted that his lighter was missing.

Officer Hewett prepared no will-say for the first trial. On April 20, 1990, in his will-say statement prepared at the request of Sergeant Chapman, he described losing his lighter out of the right breast pocket of his overalls during the search while he was crawling. He made no mention of learning that somebody had found his lighter. His will-say indicates that he assisted in the search of the area directly west of where the body was located.

On May 15, 1990, when Hewett was interviewed by the OPP in connection with Michalowsky, he stated that he had noticed that his lighter was missing when he returned to the station and had reported the loss to someone in the identification branch, but did not recall who it was. When asked at the stay motion if he reported it to someone, he answered: "I don't recall the name. A police person. ... And that's the extent of it." He claimed that he filed no report mentioning his lost lighter because he did not know that he had lost it at the scene. At the second trial, Officer Hewett remembered that he told Officer Nadeau when he discovered that his lighter was missing. When asked what further action he took, he said that he mentioned it "to another officer."

During this Inquiry, Officer Hewett provided further information. He testified that he appreciated at that time that the loss of his lighter, its description and the area in which he may have searched, might be an important piece of information. He felt that if he had lost a personal item at a crime scene, he should notify someone of the potential contamination. (He added that he never got his lighter back.)

At one point, Officer Hewett testified in the trial proceedings that he did not know that a lighter was subsequently found at the crime scene by Officer Holley. This was contrary to the information he provided earlier to the OPP in May 1990, when he said that someone had told him that Peter Holley had found his lighter. He was unable to explain this discrepancy.

As I earlier noted, Officer Nadeau's original notes for December 31, 1984, his will-say for the first trial and his supplementary report dated January 1, 1985, do not refer to any information about the lighter or any conversation relating to it.

On July 5, 1990, Nadeau testified at the stay motion. At that time he was cross-examined by Mr. Pinkofsky:

> Q. All right, sir. Was there any other topics you heard around concerning items people normally associate with cigarette smoking, such as books of matches, or cigarette packs, or lighters, or anything like that?
>
> A. Well, I heard about Officer Hewett losing his lighter and I can't recall, he *must have* told me sometime afterwards when he discovered the loss, *but I can't recall him saying that. It's possible that he did; most likely that he did.*
>
> Q. You have no memory of him ever saying that to you?
>
> A. I don't have a recollection of it, but in the back of my mind, I *almost have a feeling* that he did or he must have.
>
> Q. Why do you have that feeling, sir?
>
> A. Well I was his training officer and I'm sure that he would have shared that information with me enquiring as to what he should do concerning the loss of that. (Emphasis added.)

On re-examination by the Crown, the following exchange took place:

> Q. Constable Nadeau, if Constable Hewett had, as you say you feel in the back of your mind, reported that to you, that he lost his lighter, you would have told him to report that to the Identification Branch personnel?
>
> A. Yes. I believe that is very *possibly* the way it occurred because I would have known and I did know at the time that that would have been the procedure, at least to notify someone to make everyone aware that this item had been lost at the scene. (Emphasis added.)

Following that evidence, Officer Nadeau prepared a second will-say. This document includes the following information:

> I cleared the body site at approximately 18:00 hours that evening. And after having returned to 17 Division in Oshawa, my trainee at that time, *Constable Jeff Hewett, informed me that he'd lost his cigarette lighter at the search scene. I instructed him to notify the identification branch of this fact immediately.* (Emphasis added.)

It is interesting to note the evolution of Officer Nadeau's memory in this regard. There is no information in this will-say that he attended at the identification branch with Hewett, nor is there any information relating to a conversation Hewett had with the identification officer. By the time he testified at the second trial, however, he stated:

> I recall Constable Hewett, who was my trainee, disclosed something to me. As a result of that disclosure, [that he had lost his lighter at the scene] I gave him some information and *together we walked to the identification office* which was in the same building where Constable Hewett had a conversation with someone else. (Emphasis added.)

During the Inquiry, Nadeau provided very detailed testimony. He said that Hewett approached him after they returned from the station. He said that Hewett appeared very, very nervous while they were standing in the hallway. He was pacing, his face was getting very red and he looked down at the ground. He appeared to Nadeau to be very, very upset about something and disclosed to him that he thought he had lost his lighter at the crime scene. This conversation took place in a hallway near the staff sergeant's office. Nadeau further testified that he now recalled that Hewett was very concerned and expressed the hope that he would not lose his job over this. Nadeau responded by telling Hewett that he would accompany him to the identification office so that it could be documented in case someone found a lighter. He added that he recognized this was a very serious issue, important enough to have documentation surrounding it and to make Identification aware of it. Nevertheless, neither Detective Hewett nor Officer Nadeau prepared any contemporaneous notes or reports documenting the loss of the lighter or this subsequent conversation. Nor was either officer able to testify to which identification officer they provided this information.

According to Michalowsky's evidence at the stay motion, he and Robinet were the only identification officers on duty; if Nadeau and Hewett had spoken with someone at the lab, it must have been one of these two officers. Neither of them had any recollection of such a conversation. In fact, Officers Robinet and Michalowsky were not back at the lab until 7:20 that New Year's Eve. Detective Hewett booked off shift at 6:55 p.m.

Susan MacLean's notes of April 10, 1990 reflect that Hewett told her that he had told "Mike" (Michalowsky) about losing his lighter. During the Inquiry, Hewett agreed that, considering the timing, he could not have told Sergeant Michalowsky about this. Ms. MacLean could not recall whether Hewett specifically told her that he had spoken to Michalowsky or she had assumed it was Michalowsky. Hewett had no recollection in this regard.

When Officer Nadeau was asked by Commission counsel what had transpired to improve his memory, he claimed that the subject matter began to

> trigger certain memories in my mind, and the more I thought about it, the more something about a cigarette lighter became clearer to me.
>
> .....
>
> I endeavoured very, very deeply to recall it at the time, but that I could not recall the specifics of it, and I went through a series of scenarios; had it been brought to my attention, it might have been. I would have used this procedure. Well, that is exactly the procedure that I did use, so there were certain memories that were coming back to me, but nothing that I could turn around to the court and clearly remember because it was not a clear memory.

Officer Nadeau was emphatic that the 'triggering effect' of his memory was not induced or assisted by group meetings with other officers and Crown attorneys. His evidence before the Commission was that it came about on his own.

Officer Hewett's memory also evolved. For example, when he provided testimony at first instance, he was unable to recall the colour of the lighter. During a later proceeding he described it as yellow.

The Condition and Disposition of the Lighter: Holley

As earlier noted, Officer Holley's notes did not refer to the lighter found. 'His' first will-say describes the lighter only as a "disposable type lighter." There was no reference to the condition of the lighter. Ms. MacLean's notes of April 10, 1990 reflect that Holley told her he found the lighter under the snow and turned it over to Michalowsky, who told him that it belonged to an officer who had been at the scene. In an April 24, 1990 supplementary report, he added that the lighter did not appear to have been there long and that it was under the snow, on top of the frozen ground. At the stay motion, he testified that the lighter appeared to have been dropped recently. He then provided an additional will-say which described the lighter as a "Bic-type disposable lighter." At the second trial, he swore that the lighter was "fairly new, with no rust on it, it could have come out of the store." At the Inquiry, he said it was "brand new" and appeared to be "just out of the store." Officer Holley put considerable emphasis on the fact that the lighter must have been dropped fairly recently as "it was not quite stuck into the ground." This was one of his foremost considerations in coming to the conclusion that the lighter was newly disposed of at the site. (Interestingly, it appears clear from the photographs that Christine Jessop's button, also found at the scene, was sitting loosely on top of the ground.)

During the Inquiry, Officer Holley testified that he did not believe, even at the time he found the lighter and before giving it to Sergeant Michalowsky, that it belonged to the killer:

> I felt at the time it was too good to be true because the lighter - it was just too new. I just - I didn't think it would be. But for whatever reason, that's what I thought at the time, it's just too good to be true.

Sergeant Michalowsky, when questioned by the OPP, stated that he knew nothing about a cigarette lighter. He did not recall Officer Holley giving anything to him on January 3 or 4, 1985. He had no notes reflecting such a discovery, nor did he recollect any conversation with officers stating that they had lost a lighter. Officer Holley, when he testified at the Inquiry, said that he would not place a great deal of faith in the word of Sergeant Michalowsky.

An Alleged Conversation between Hewett and Holley

Officer Hewett testified at the Inquiry that, in April 1990, while using the photocopier at the station, Holley came up to him and asked if he had ever gotten his lighter back. When Hewett told him that he had not, Holley smirked. Officer Hewett testified that he found it curious that Holley was discussing this matter some five years after the event, but he never pursued it.

This is in conflict with the evidence of Officer Holley. He emphatically denied, both at the stay motion on July 4, 1990, when asked about this conversation (some three months after it allegedly took place) and at the Inquiry, that he had ever spoken with Hewett about this matter.

Hewett, Holley and Nadeau Meet with Crown Attorneys

On Friday, October 26, 1990, a meeting was held at 18 Division in one of the classrooms commonly used by recruits in training. Those attending included Officers Nadeau, Fitzpatrick, Shephard, Cameron, Hudson, Holtorf, Hewett, Wooten, Hammond, Harmer, Kapuscinski, Bradley, Myers, Brown, Naccaratto, Pursey and Crown attorneys MacGuigan, Smith, and MacLean. There were discussions regarding the crime scene and photographs were examined. A map of the body site area was also reviewed at the time.

The event was described by Officer Nadeau as a group meeting where everyone discussed his recollection in one sitting. Nadeau said that his memory of this meeting was vague; however, he heard the evidence of other officers, listened to them discuss matters and saw them demonstrate the location of evidence on maps. He maintained, however, that none of this affected his memory or recollection.

Police notebooks record a meeting in London on December 8, 1991 from 7:00 p.m. to 9:00 p.m., attended by Ms. MacLean, Mr. Smith, Mr. McGuigan, Detective Fitzpatrick, Sergeant Chapman, Sergeant Brown, and Officers Hewett, Nadeau and Holtorf. This was a preparatory meeting prior to their December 9 to 11, 1991 testimony. While Ms. MacLean did not believe that the witnesses were interviewed jointly at this time, they may have been shown the diagram/map as a group and told that they would be asked to point out where they searched and, if they found evidence, where they found it. They were then interviewed separately.

Mr. Smith stated that there had been a lot of confusion about the locations of the officers' searches which may have been resolved at that meeting. He said that the Crown attorneys were careful to avoid the problem that arose at the stay motion where the officers were "all over the map" in their search. They made a point of having the officers orient themselves to the diagram and to point out where they had searched. Mr. Smith said they made it clear to the officers that it was important to be specific on this issue because they were trying to demonstrate that the search was systematic. Mr. Smith was unable to say if Nadeau and Hewett were putting themselves where Holley said he found a lighter; he believed, however, that it would be negligent for counsel to call a witness and put a map to them without first allowing them an opportunity to orient themselves to that map.

During the Inquiry, Officer Nadeau conceded that

> [p]eople can be influenced very easily by what they hear from other people; that's how gossip gets started. You know — one thing leads to another, which leads to another and I think if you're one on one with an individual witness, and you are talking to one witness as opposed to a group of witnesses, say this room, for instance, then you are getting a more honest – well, perhaps not more honest, but a clearer picture of what they recall.
>
> And they're not about to adopt somebody else's memory and begin to nurture that as being their own which human nature sometimes do. We sometimes hear things that other people have said, and believe that we actually did see it that way, and you see it in even the most minor of investigations at the scene of an accident where one person may give you an account of how the accident happened.
>
> The other individual says: Oh yeah; it would have happened that way, and they're just going along with the flow of things, and collecting little pieces that they later give, and it didn't come from them, it came from somebody else.

He agreed that such meetings could conceivably taint the officers' recollections. Nevertheless, when asked whether it was possible that it could have assisted his own evolving recollection, he maintained that all

recollections were his own.

Findings

Nadeau, Holley and Hewett were vigorously cross-examined by counsel for Guy Paul Morin at this Inquiry. He prefaced his cross-examination of Officer Hewett as follows:

> Mr. Hewett I want to start off by explaining to you the direction in which my cross-examination of you is going to go so that it's clear to you, and for that matter everybody else, but particularly it's clear to you. And essentially, my questioning of you sir is going to fall into three parts. The first part is going to suggest to you that you were recruited as a result of Holley having referred to finding a lighter at the scene in his original willsay.
>
> You were recruited to be the person who dropped the lighter so that that accounts for the lighter that he found, as opposed to having belonged to perhaps the killer of Christine Jessop. And that you were also recruited to deal with the problem presented by Michalowsky who was unable to produce the lighter by the time the second trial and indeed, when he gave his evidence, denied knowledge of it ever having existed. He denied he was ever given it by Holley in the first place.
>
> .....
>
> The second area I'm going to question you about sir and suggest to you is that in order to buttress your position that it was your lighter found at the scene, it became necessary to come up with someone else who would support you by saying that you had indeed dropped your lighter at the scene and told someone right back in 1985. And also, you helped provide evidence to try and explain why this lighter would have disappeared. That's the second area, understand that, sir?
>
> .....
>
> The third area, sir, is that in order for the lighter that Holley found at the scene to be yours you had to have

> searched the area where Holley said he'd found the lighter, otherwise you could hardly have been the one who dropped it where he said he'd found it; you understand?
>
> .....
>
> And I'm going to suggest to you sir, that you and Nadeau got into a horrible mess at the beginning because you both identified an area which was not where Holley said he'd found it, and so you had to do a quick adjustment by the time of the second trial and change your evidence so that you now had you and Nadeau searching an area where Holley had said, back in 1985 he'd found the lighter, do you follow?

On the totality of the evidence, I am unable to find that a conspiracy existed to recruit witnesses to give false evidence on the lighter. Having said that, I must add that the quality of the evidence before the Inquiry bearing upon the lighter, its location, condition, and disposition is quite unsatisfactory.

In my view, this lighter probably had nothing to do with the identity of the perpetrator. Indeed, Hewett may have been responsible for it. We do not know. Why do we not know? — because no one documented anything in connection with the lighter in a contemporaneous note or supplementary report. If an item was worth picking up and retaining, I would have thought it self-evident that it was worth recording. The absence of any contemporaneous record of the lighter's location, condition or ownership *before* Guy Paul Morin was arrested or became a suspect invites concern that details that are later supplied are tailored to refute the position of the defence.

I am fully cognizant of the fact that memories are not frozen in time. Additional details can be recollected some time after the events, particularly where the details may not have been regarded as terribly important initially, but acquired significance due to very precise, exacting questions put by a defence counsel who is not daunted by complexity or detail. Put succinctly, I have made generous allowance for this human phenomenon in evaluating the evidence at this Inquiry.

The 'lighter' evidence is but one manifestation of an all too common event during the Morin proceedings. As the defence explores perceived

weaknesses in the Crown's case, officers are able to recollect, sometimes with amazing precision, the detail that rebuts the defence and fortifies the Crown's position. (Though witnesses may recall additional detail over time, it is more common that recollections are dulled through the passage of time.) That is why contemporaneous notes and transcripts of prior proceedings assist recollection and enable witnesses to, at least, preserve memories which they once had.

On the 'lighter' evidence in particular, I have no doubt that each of the witnesses was affected, to varying degrees, by the positions taken by others: As a result, I cannot place reliance upon the accuracy of their recollections before me, even acknowledging, as I say, that their evidence may have involved a relatively insignificant matter in the scheme of things. I do not find, however, that their evidence was knowingly false.

(ix) The Cigarette Butt(s)

Background

On December 10, 1985, prior to the commencement of the first trial, a meeting was held between John Scott, Mary Bartley for the defence, Sergeant Michalowsky and Officer Robinet at the identification office in Durham for the purpose of disclosing photographs. While Sergeant Michalowsky was displaying photographs, he came to one depicting a partially smoked cigarette. Michalowsky made a joking comment to Ms. Bartley, "See, we even find our own officers' cigarette butts." This is curious as, at this time, there had apparently not yet been a Durham officer who claimed to have deposited a cigarette butt at the body site; neither Officer Robinet nor Sergeant Michalowsky had spoken with Officer Cameron about a cigarette butt he had left at the site. Shortly thereafter, Mr. Ruby's office requested more information on the cigarette butt that had been found at the scene.

On December 27, 1985, there was a meeting between John Scott, Susan MacLean and Durham police officers at 18 Division. During this meeting, Mr. Scott reportedly was upset about a missing cigarette butt and instructed Michalowsky, in no uncertain terms, to locate it. Officer Robinet was unable to recall whether he had any discussion with Sergeant Michalowsky or had been made aware of the fact that the cigarette butt could

not be located prior to this meeting. Scott asked the assembly of officers whether the cigarette butt belonged to any of them. No one claimed it. Michalowsky later represented that he had found the butt under the flap of an exhibit box. (This meeting is elaborated upon below.)

During Mr. Morin's first trial, Sergeant Michalowsky testified that a member of the search team, whose name he did not record, found a cigarette butt in the vicinity of the body. Michalowsky produced it in evidence and described it as a recently dropped butt. He conceded during cross-examination that he was not in a position to state how long the butt had been in the vicinity of the body site.

Sergeant Michalowsky further testified that he had not turned the butt over to the Centre of Forensic Sciences on January 11, 1985, contrary to his evidence at the preliminary inquiry. He explained that, following the preliminary inquiry, he had checked his forms and submissions and realized that he had erred. Thus, despite the fact that a saliva test could have been done on the cigarette butt, it had not been sent for this analysis.

I earlier noted that two photographs of a 'cigarette butt' were introduced during the first trial. As discussed, at the first trial, Sergeant Michalowsky testified that these were photographs of the same object taken at the same place. One photograph showed what appeared to be a cigarette butt in long grass. He testified that the second photograph depicted the same cigarette butt after the grass had been pulled back.

Michalowsky subsequently testified at the stay motion that one of the photographs was not a cigarette butt but was, instead, "a piece of [birch] bark that looked like a cigarette butt." He said that he had been advised by the Ontario Provincial Police in his May 29, 1990 interview that one of the photographs allegedly depicted a piece of birch bark. Before this interview Michalowsky had assumed it was a cigarette butt and had testified accordingly at the first trial. Officer Holtorf testified on the stay motion that he had found this birch bark during the body site search of December 31, 1984. The details of Officer Holtorf's revelation relating to the 'birch bark' are discussed below.

(x) Birch Bark v. Cigarette Butt

Holtorf and the Birch Bark

At the stay motion and at the second trial, much testimony surfaced surrounding the discovery of the cigarette butt (or butts) during the search on December 31, 1984. As stated earlier, during the first trial two photographs were tendered by Michalowsky purportedly representing one cigarette butt. The investigation following the first trial disclosed that these pictures depicted different items photographed at different times. In addition, it was determined that the cigarette butt tendered could not have belonged to Officer Cameron. (This will be more fully discussed later in this chapter.)

Officer Holtorf was called at the stay motion in 1990. He provided evidence that one of the photographs that had been tendered during Morin's first trial, purportedly of a cigarette butt, was not a cigarette butt at all, but rather a piece of birch bark that he had found during his search of the body site.

Officer Holtorf testified that he arrived at the scene in order to assist with the search at 4:20 p.m. Dusk was beginning to set in. He noted that officers were searching in various locations. He began searching approximately five to six metres north of the roped-off area and proceeded in a westbound direction. He testified that, during the search, he found two items: a credit card receipt and a piece of birch bark that he initially believed was a cigarette.

The credit card receipt (subsequently determined to be irrelevant to the crime) was found one to two metres off the tractor path, five to six metres north of the roped-off area.

Shortly after Holtorf found this receipt, he noticed a cylindrical object approximately one-half inch long, one-quarter of an inch in diameter. It was deep down in the grass, approximately two to three metres further in from where he found the credit card receipt. It appeared to be a cigarette butt. Sergeant Michalowsky came over, bent down and looked at the object. He asked Officer Holtorf to point to it while he took one photograph of the object in the tall grass. After taking the picture, he picked it up with a set of tweezers. Holtorf testified that upon doing so, Sergeant Michalowsky

observed that this was merely a hollow tube of white material that appeared to be rolled-up birch bark. Sergeant Michalowsky seemed 'a little bit upset'; he held out the piece of birch bark to the constable, gave him a 'nasty little glare' and walked off. Officer Holtorf believed that Sergeant Michalowsky discarded it along the roadway.

Officer Holtorf did not reflect this finding of birch bark in his notes, nor in his supplementary report, nor in the first will-say he prepared because he did not think it had any importance.

When Sergeant Michalowsky testified, he had no recollection of photographing a piece of birch bark, nor did he recall picking one up with tweezers. He said that he did not even have a pair of tweezers with him. On the stay motion, he said that he did not pick up a piece of birch bark and toss it away, and that he believed he had photographed a cigarette butt.

Analysis of The Object Depicted in the Photograph

The photograph of what Holtorf since claimed to be 'birch bark' was entered at the first trial as one of two photographs of a cigarette. The photographs are dissimilar in that the first is a picture of a person pointing to an object in long grass (which Michalowsky represented as the first in sequence) and the second is a picture of an object with no grass surrounding it (which Michalowsky represented as taken after the long grass depicted in the first picture had been pulled away.)

As the OPP became involved in the investigation into Sergeant Michalowsky, the original colour contact sheets, from which the photographs were made, were analyzed. These contacts showed that Sergeant Michalowsky's second picture of the 'cigarette butt,' with no long grass surrounding it, was taken *before* the picture of the person pointing to a 'cigarette butt' in long grass. Michalowsky's explanation was, therefore, impossible.

What then was to be inferred from two photographs of a 'cigarette butt' taken in two different locations? Were two butts found? There were two expert examinations of the photograph with the finger (Holtorf's) pointing to it to determine whether or not it was, indeed, a photograph of a cigarette or of birch bark or neither.

The first examination was performed on August 22, 1990 by William Bruce, an expert in remote sensing, analysis, enhancement and interpretation of photographs. He testified at the stay motion:

> Based on the same interpretation criteria as were applied to the photograph with No. 4 in it [that is the photograph of an actual cigarette butt], it is evident that the feature in the other photograph [the photograph in question as to whether it was birch bark or a cigarette] *is a man-made feature* by the same criteria.... I am looking at the very sharp-edged feature, the bright white colouring of the feature, the size and shape of the feature as being consistent with certainly an interpretation as a man-made object. That interpretation is consistent with the object being something of the size and shape of a cigarette butt or a piece of chalk, or a white pencil, something of that dimension.
>
> .....
>
> Compared with the size of the hand and the finger [which in this case we learned was the finger of Constable Holtorf] and compared with the grass leaves surrounding it, we can come to what I'm confident is quite an accurate assessment of the relative size of the object.... I would expect to see the birch bark in an irregular form.
>
> .....
>
> It is unlikely that the bark would come off in as consistent and as uniform a piece as one would expect say in a natural object or the object we see in this photograph. It is unlikely as well that the natural birch bark would take a cylindrical form that would be particularly precise in terms of the edges being parallel to one another. (Emphasis added.)

As digital computer enhancement was not effective, Mr. Bruce relied on visual interpretation of the imagery under high magnification involving an analysis of tone, texture, pattern shape and association. The end of the object was somewhat obscured by leaf overlay. In his opinion, there was a possibility, albeit a low possibility, that the object was not man-made. Mr. Bruce concluded that the object was more likely a cigarette butt, but it could be a piece of birch bark. He was able to determine, however, that the

vegetation in the two photographs demonstrated that the photographs were taken at different locations.

An F.B.I. expert examined the same photograph and rendered a report dated May 6, 1991. He concluded that the identity of the object depicted could not be determined.

In the midst of the second trial, the Crown made the following admission relating to the two photographs:

> The cigarette butt introduced at the first trial as being the cigarette butt found at the body site on December 31st, 1984 is not the cigarette butt that was found and photographed at the body site on December 31st, 1984, Photograph 39 at this trial.
>
> The second fact that the Crown is prepared to admit is that Photographic Exhibit 39 [object in short grass] in the first trial, was photographed before Photograph 36 [object in long grass]. This has been established by an analysis of the negative role.
>
> The third point that the Crown is prepared to admit as a fact is that the cigarette butt pictured as 39 is lost or missing.

Holtorf's Handwritten Statement

In approximately March 1990, Officer Holtorf attended a meeting at which he was asked to provide information relating to his search activities in anticipation of the pending stay motion and upcoming trial. He testified that he was unable to find his old notebooks, and had to prepare a document without the assistance of his notes while the meeting was in progress. His notebooks were kept in the basement of his home. At the time, he said, officers were not required to turn notebooks into the station and they were able to retain them themselves. He also said that "[i]t was up to us to destroy them when they were no longer required, as long as the time was past the retention date." That policy was subsequently changed by the Durham Regional Police Service.

The document that Officer Holtorf prepared at the meeting was extremely detailed and not written in will-say form, but rather in the format

of a notebook entry. At the time of making these notes, he was alive to the issue that there was a problem with the conduct of Michalowsky. Holtorf's information was very detailed in terms of time and location considering he did not have use of his notes. He recounted in these 'notes' for the first time in writing the fact that he located what appeared to be a cigarette butt, which subsequently turned out to be a piece of birch bark. He made no mention in these notes of the credit card receipt which he stated he found. He stated that he found this piece of birch bark at 4:58 p.m. Officer Holtorf conceded that this was remarkable specificity considering he had no notes documenting this find and the search had occurred some five years earlier:

> Q. It was a pretty good guess some five years later, though.
>
> A. Well, I think that seems to be too much of a coincidence to hit it that close. I don't know where it came from.

Again, coincidentally, 4:58 p.m. matches the exact time that Holtorf actually did locate the credit card receipt.

He testified that he had spoken with Officer Fox approximately a day earlier when he had been notified that there was a meeting and he was unable to find his notebooks. Despite the fact that he had already prepared a will-say in this matter in 1985, and the fact that he was not told prior to the meeting that another will-say was required, he explained that he gained Officer Fox's assistance for specific details relating to some of the times. But, as noted during the Inquiry, Officer Fox was the officer stationed at the roadway and would have had no way of providing him this 4:58 time. When this proposition was put to him by Commission counsel, he conceded that there would have been no way he could have ascertained from this officer what time he actually found an exhibit.

Officer Holtorf then testified that he had no real knowledge of timing but that he simply "approximated" the times which they did not come from anyone else.

In March 1990, when he wrote these 'new notes,' Holtorf had heard some talk that there was a problem with a cigarette butt. He testified that by this time he knew that Michalowsky had lost an exhibit or lost a cigarette butt, but did not know specifics. Yet, on April 12, 1990, when he was

interviewed by the OPP in the Michalowsky investigation, he claimed this was the first time he realized there was an issue about the birch bark. He was shown two photographs, one of which he was able to identify as his finger pointing to the birch bark due to a scar that he had on his knuckle area. Approximately one year later, on March 4, 1991, the information that Holtorf provided was incorporated into a will-say statement.

Findings

Two photographs were tendered as evidence by the prosecution at the first trial. They were represented by Sergeant Michalowsky to be photographs of the same cigarette butt found at the scene. This was incorrect. The Crown was unaware that this was untrue and acted in good faith in tendering these photographs.

After the first trial it became clear that Sergeant Michalowsky's explanation could not be true. The photographs were not taken in the sequence described by him; nor were they taken in the same location. This raises an interesting issue — what was depicted in the photograph with a finger pointing to it?

The finger was apparently Holtorf's; however, this did not resolve the issue. At the second trial, Holtorf swore that the object was a piece of 'birch bark.'

This explanation raised its own problems. Nothing about finding 'birch bark' is recorded in Holtorf's notes, supplementary reports or in his first will-say. Frankly, this would not be surprising, since the finding of birch bark would be an insignificant event. More problematic is why birch bark would be photographed, with Holtorf pointing to it, had it only been birch bark and had Michalowsky discarded it with disdain. Holtorf says that it was only identified as birch bark after the photograph was taken. This would mean that Michalowsky fully preserved the moment on film before ascertaining whether there was anything of significance found. The circumstances under which Holtorf came to document his find raise additional questions, the most obvious being his explanation as to how he came to identify the time of the finding with such precision. The forensic evidence does not assist me in the resolution of this issue. Michalowsky's earlier evidence cannot be relied upon in any way.

The state of the evidence does not permit me to accept or reject Officer Holtorf's evidence. Having said that, the quality of the evidence before the Inquiry is quite unsatisfactory.

Like the 'lighter' evidence, earlier addressed, this object found at the body site probably had nothing to do with the identity of the perpetrator. Again, we do not know; we do not know because no one documented anything in connection with an object which was located and photographed. The absence of any contemporaneous record about this object *before* Guy Paul Morin was arrested or became a suspect and *before* the identity of the object became an issue, invites concern that details that are later supplied about the object are tailored to refute the position of the defence.

It would, of course, be interesting to know just what was in the photograph. However, since two experts were unable to resolve the issue, it is clear that the Commission cannot do so either, and the matter must, therefore, remain unresolved.

(xi) Milk Carton

Constable Joseph Kapuscinski was an officer with the Durham Regional Police Service for 25 years when he attended the body site of Christine Jessop in December 1994 to help in the search. He was instructed by Sergeant Scott to go to a certain location west of the pathway and search the ground. When he arrived at 5:22, it was already getting dark. With the assistance of his own flashlight and the floodlights in the area, he searched an area south-east of the roped-off area on his hands and knees. He did not find anything.

His next involvement in the Jessop investigation was on March 15, 1990, when he learned that he was to attend a meeting with the Crown attorneys. He asked Sergeant Michalowsky where the meeting was taking place. As Kapuscinski stated on June 22, 1991 during the pre-trial motions, Sergeant Michalowsky

> [a]t first he just informed me that he had my name down in his notebook and that it was highlighted. ... And I just looked at him and didn't know what he was referring to and he indicated that I had found something at the scene. ... He indicated a milk carton.

Officer Kapuscinski told the Inquiry that he was shocked and surprised as he had no recall of finding anything at the scene. He went back to his desk, rechecked his notebook to reassure himself, and told Sergeant Michalowsky that he had not found anything. Sergeant Michalowsky responded that he should not worry about it and that "it would work its way out."

Kapuscinski attended the meeting later that day. He spoke with Ms. MacLean and told her what had transpired before in his conversation with Sergeant Michalowsky. She told him that she would look into it.

Michalowsky's evidence before the jury was that he believed one of the items seized on December 31st was a milk carton, but he could not recollect who had found it. He indicated that he had in his notes that it had been found by Kapuscinski, but he recalled no conversation with Officer Kapuscinski, contrary to the latter's assertion.

When Michalowsky was asked about this during the stay motion, his explanation as to why Kapuscinski's name appeared next to the milk carton entry was that he had tried, where he could, to put the name of the officer who had either found or pointed out the exhibit to him. He testified that it was Kapuscinski who had either found or pointed out the carton to him. As stated above, Kapuscinski emphatically disagreed with that proposition.

Findings

I unequivocally accept Officer Kapuscinski's evidence. He found no milk carton. Michalowsky's second notebook was not an accurate account of events in this regard.

(xii) Hudson and the Cigarette Package

Sergeant Kenneth Hudson was called by the defence at the stay motion. He arrived on the scene sometime after 4:00 p.m. He had been part of the hands and knees search at the body site.

Sergeant Hudson testified that during the search, Sergeant Michalowsky was called over either by himself or another officer searching nearby. He testified that he saw "some kind of an object ... off to one side"

from where he was searching. At the time, he thought it was a faded package or carton. He testified that it was hard to see exactly what the package was because it was in tall grass and it was getting dark.

In May 1990, Sergeant Hudson was interviewed by the OPP in relation to their investigation into Sergeant Michalowsky. His discussion with the OPP officers was reduced to writing, and a review of the notes indicates that this was done while he was speaking. This is what the notes say, in part:

> - Found a cigarette package, faded.
>
> - Someone else found a pop can.
>
> - Others found bits & pieces that Michalowsky put in bags.
>
> - Attended pre-trial meeting with Sue MacLean for the upcoming trial. That was the only meeting he attended.
>
> - Cigarette package was given to Michalowsky and put in a plastic bag.

Prior to his meeting with the OPP he had never indicated in any notes, supplementary reports or will-say statements, that he found anything at the body site, let alone a cigarette package. He further agreed that if he had found a cigarette package at the scene, it was important information relative to the discovery and prosecution of the murderer of Christine Jessop. He stated that he had not ever told a Crown attorney or any investigators prior to May 1990 that he had found a cigarette package

> because [he] wasn't aware of it ... Through the discussions with the OPP, I think *we* arrived at a scenario that the thing I saw resembled what looked like a cigarette package, and I sort of concluded in my mind that might have been what it was. So that's the statement I took down. (Emphasis added.)

Sergeant Hudson told the Inquiry that when interviewing a potential witness it is important to obtain the witness' actual recollection and to guard against hearsay or speculation. He stated that if a witness was speculating or hypothesizing about something, it would be desirable to so indicate to the interviewing officer. He conceded during the Inquiry, however, that he did not present his evidence to the OPP or recall the events with the same degree

of accuracy and care that he would desire from a civilian witness that he might interview. He claimed that he was led into speculative areas by the OPP. According to Sergeant Hudson, he made assumptions and speculated about a lot of things because he was not clear on a lot of points and the OPP officers "seemed to want some clarity."

On June 13, 1990, Sergeant Hudson was again called in to provide a further statement to the OPP. In the interim, one of the OPP officers discovered that Sergeant Hudson's supplementary report of the search documented that he had found nothing at the scene. Sergeant Hudson stated that this caused him no embarrassment or concern. During this interview a new statement was made, which Sergeant Hudson signed. In the notes by the OPP of their June 13, 1990 interview with Hudson, he was recorded to have said this:

> - Cannot recall anything about the cigarette package or pop can, not now sure whether he found the cigarette package or pop can or if others searching close to him found those and he saw this happening.
>
> -Cannot definitely say now that it was a cigarette package, it might have been the milk carton.
>
> - He has no notes of attending a meeting at 18 Division on December 27/85.

Hudson testified during the Inquiry that the OPP led him to believe that he was to speculate during both interviews. He therefore went forward during this interview into an area of speculation about a milk carton. Sergeant Hudson testified at the second trial about his evidence relating to the cigarette package "It was so long ago, I just – I think I was trying to be too helpful and I was too imaginative, possibly." During the Inquiry he was asked:

> Q. [Currie] But, sir, as an experienced professional officer with years on the force at that point with a history of interviewing witnesses, with a history of taking witness statements, did you think that speculation was truly as helpful to them [OPP] as recounting what you remembered and what you didn't?
>
> A. [Hudson] But they seemed to be encouraging me to do that, for whatever their reason was. I didn't know what their purpose was and I wasn't going to question

> their purpose. I was told to cooperate with them and help them as best I could.
>
> Q. So it was their fault?
>
> A. I don't know, I'm not saying it was anybody's fault, I was just following their line of questioning and their demeanor. I wasn't trying to be indifferent, I was trying to be probably too cooperative, maybe or — I don't know.
>
> Q. By too cooperative, you mean putting forward what you claimed to Ms. MacLean was your imaginings?
>
> A. Well I left it up to them. They knew what they were looking for, and I assumed, I don't know. They were asking me things and I was telling them, and they draw their own conclusions, I would assume, with their experience, the same as I would if I thought it was speculation or it was nothing to do with what I was asking, I'd probably use a different ... or I'd mention it.
>
> .....
>
> Q. We just read your portion of the evidence where Mr. Pinkofsky clearly asked you 'Did you tell them you were speculating?' and you said, 'No, I did not.' Do you remember reading that?
>
> A. Yes I do.
>
> Q. Okay. Are you changing that evidence now?
>
> A. No. I assumed if they thought I was speculating that they'd tell me.

It was not until Hudson provided testimony at the second trial that he mentioned that he was some distance (10 to 15 feet) away from the package.

When he was cross-examined on April 29, 1992 at the second trial by Mr. Pinkofsky, he stated that he believed that the answers he provided to the OPP officers in May 1990 were the best, most honest recollection of what he had found. He further stated that he adopted what was written by the OPP officers as an accurate rendering of what he had said.

When questioned at the Inquiry, he said that the OPP had been inaccurate in taking down what he had said in May 1990. He further stated that the report of the faded cigarette package was "what was concluded after talking with them." He was emphatic at the Inquiry that he did not actually tell the OPP officers that he had found a cigarette package.

With reference to the statement in the OPP report that reads "[c]igarette package was given to Michalowsky and put in a plastic bag," Sergeant Hudson indicated to the Commission that he did not give it to Michalowsky, nor did he put it in a bag: "I made an assumption he [Michalowsky] was in the area and he put it in the bag, that's all."

Hudson also testified at the Inquiry that he called Sergeant Michalowsky over two or three times during the search. On all occasions, he said, he was merely attempting to relay messages to him because someone else could not attract his attention.

During his evidence before the Inquiry, Sergeant Hudson testified:

> Q. As you stand today, what's your present belief of whether you found a cigarette package or a milk carton?
>
> A. I didn't find either one.

Findings

At best, on Sergeant Hudson's own evidence, he was too imaginative and speculative in articulating what he found at the scene. At worst, his evidence excites the same kind of concerns reflected by me in connection with other aspects of the body site evidence discussed elsewhere in this chapter. I am unable to determine what, if anything, Hudson found. I do not accept or reject Hudson's evidence. The quality of the evidence before this Inquiry bearing upon this issue is unsatisfactory.

Officer Cameron's Attendance at Body Site

On December 31, 1984, Officer Cameron was on regular patrol duties when he received instructions to attend at the Fourth Concession of Brock Township to assist in the search. He arrived at the scene at 4:58 p.m. (That

time becomes important.) Officer Cameron recalled receiving no particular instructions when entering the site from the officer stationed at the roadway. He smoked a cigarette as he walked southward along the pathway. He could not recall precisely when he lit up, but was under the impression that the actual body site or crime scene was a considerable distance along the pathway from the Fourth Concession.

At first, as he proceeded southward on the tractor path, he was unable to see any activity. But 20 yards down the path, at the point where it curved, he was surprised to see ahead of him, on the east side of the path, the Durham identification van and a number of officers milling around it. He immediately extinguished his cigarette on the heel of his boot and threw the butt on the west side of the path. He did so, he told the Inquiry, first because he was in uniform, and smoking while in uniform was not permitted, second because he realized he had entered an area where he should not have been smoking regardless of his dress, and third he noted a senior officer ahead — three good reasons for disposing of his cigarette. He estimated that the area around the bend where he had butted his cigarette would have been 60 to 70 yards north of the roped-off area in which Christine Jessop's body had been found. At no time did he see, or subsequently learn, of anyone searching in the area in which he threw his cigarette butt. In addition, Sergeant Michalowsky's second notebook (discussed below) suggests that the cigarette butt was found 20 to 30 feet north of the roped-off area.

Officer Cameron assisted in the ground search. He was assigned by Sergeant Scott to participate in a search of an open area or meadow to the west side of the pathway for approximately 20 minutes until 5:20. He found nothing during his search. He was then called to assist in moving the remains of the body into the hearse. At 6:33 he escorted the hearse to the Coroner's Building in Toronto. Cameron's notebook of that day and his subsequent supplementary report do not reflect the fact that he butted his cigarette on the way into the search area. He stated that, at the time, it did not have relevance as it was not a significant event and, in any case, he should not have been smoking in those circumstances. *I accept his evidence in this regard.*

He had no further involvement in this case until December 27, 1985.

The December 27, 1985 Meeting

This meeting was held in an in-service classroom at 18 Division in

Whitby. Present were Mr. Scott, Ms. MacLean, Officers Fitzpatrick, Shephard, Cameron, Nadeau, Nechay, Bunce, Thompson, Wilson, Patton, Heaver, Keeler, Robinet, Tucker, Mills, Hudson, Scott, Michalowsky, Fox, and Inspector Brown. The meeting called by Mr. Scott for the purpose of reviewing the role of each officer at the scene, lasted approximately two hours. Each officer listened to the other officers tell the Crown attorneys how each participated at the crime site. Each officer shared with everyone what he had to say on the various issues. Officer Robinet said that it is not a normal occurrence that police officers, prior to testifying at a trial, get together in a group and proceed to hear the evidence of all the other police officers involved in the case. He told the Inquiry that he had never before attended any meeting like it. Ms. MacLean told the Inquiry that this was the only meeting she could recall with Durham Regional officers where evidence was discussed in a group setting.

Officer Cameron believed that his presence was required at this meeting to provide evidence relating to continuity, as he had escorted the remains to Toronto. He recollected that Mr. Scott, the Crown attorney, addressed individuals in the room and asked them, while sitting together in this room, to outline their involvement at the scene or elsewhere. Officer Cameron testified that he believed the meeting specifically related to evidence obtained at the crime scene. In the context of this conversation, Mr. Scott looked at Sergeant Michalowsky and asked him "Did you find the cigarette butt yet?" Sergeant Michalowsky answered that he had not. Mr. Scott then responded "Well, find the fucking thing," or something to the effect that he wanted "to know whose fucking cigarette butt it is." Mr. Scott's demeanour was described as 'exasperated' by one of the officers who was in attendance. Scott then directed his attention away from Michalowsky and said to the group in the room, "Nobody here threw away a cigarette butt up there, did they?" This was the first time Officer Cameron had heard anything about a cigarette butt.

Officer Cameron testified that he said nothing at the meeting about throwing away a cigarette butt that day. During this meeting, he said, he did not even recall that he had actually thrown away a cigarette butt.

Officer Robinet, on the other hand, later testified that, at this meeting, Officer Cameron responded to John Scott's outburst by stating "I think it's mine." Cameron was emphatic that he did not make this statement. None of the other police officers who were in attendance at this meeting recalled him

making such a statement. Ms. MacLean's contemporaneous notes for that meeting date report "don't know who threw cigarette butt down."

Findings

I will express my views as to the dangers of collective meetings to discuss substantive matters later in this section. However, I would like to think, in the absence of evidence to the contrary — which I find wanting — that it was the genuine desire of Mr. Scott and Ms. MacLean to learn as much as possible about the case and that it was not their intention to encourage prospective witnesses to change their stories.

Conversations between Cameron and Fitzpatrick

Approximately one week after the December 27th meeting, Officer Cameron received a telephone call from Detective Fitzpatrick. He told Officer Cameron that he was conducting a canvass of officers who had been at the scene to inquire whether or not they may have been smoking at or near the body side and whether or not they may have thrown away any cigarette butts. Officer Cameron was known to be a smoker. Fitzpatrick may or may not have specifically asked Cameron whether he had thrown a butt away. During this telephone call, Officer Cameron recalled and advised Detective Fitzpatrick that he had thrown away a cigarette along the tractor path. While Fitzpatrick testified that the butt was found approximately three or four feet to the side of the tractor path, he did not describe its distance from the Fourth Concession or the roped-off area. Officer Cameron was unsure of Fitzpatrick's precise words, but he recalled the conversation as one in which Fitzpatrick asked the questions and he answered them. He was unable to obtain any further information as to where this cigarette butt was found. Detective Fitzpatrick told Cameron that a fresh cigarette butt had been found and he asked Officer Cameron what brand of cigarettes he smoked. Cameron replied that he smoked Craven Menthol.

While Officer Cameron did not have a precise recollection of the conversation, he testified that he attempted to explain to Detective Fitzpatrick where he had thrown away his cigarette butt. He told Fitzpatrick that he threw away his butt just south of where Officer Fox was standing near the mouth of the tractor path. He stated that it was north of the actual crime scene. At no time did Detective Fitzpatrick specify precisely where the butt had been found or tell Cameron that the cigarette butt that was found was a long

distance away from where Fox was stationed. Fitzpatrick stated that Cameron would likely be asked about it at trial and would have to explain his actions to the Court. Officer Cameron's impression from the phone call was that it was implicit in the questions and in Fitzpatrick's reactions to his answers that they were talking about the same cigarette butt. Detective Fitzpatrick testified that he was under the impression that the cigarette butt "was found in the vicinity of the remains."

I find that Detective Fitzpatrick did not have a clear idea of exactly where the cigarette butt was found. It may well be that, in his opinion, this was of no importance since the butt appeared to be fresh. On the other hand, once it was picked up and tagged as a potential exhibit, it was incumbent on all concerned — and this included Fitzpatrick since he had been charged with making inquiries — to find out, insofar as that was possible, the precise location of the butt. This was an error in judgment caused by his view of the butt's unimportance. I do not find that he knew, after speaking to Cameron, that the butt found at the scene could not be Cameron's.

On January 12, 1986, the night before Cameron was to testify at the first trial, he went to Detective's Fitzpatrick's hotel room in London so that they could go together to a preparatory meeting for Cameron's evidence with the Crown attorneys. In Fitzpatrick's hotel room, Cameron was anxious to learn more about the cigarette butt and the location of its discovery in order to satisfy himself that it was, indeed, his butt. Cameron testified about this meeting:

> Q. And were you able at that time to find out more information about cigarette butt?
>
> A. No, I did not find out any more information about the cigarette butt, but I think, as a result of the conversation, it was reinforced for me further that Detective Fitzpatrick believed that the cigarette butt that had been found was my cigarette butt. That was what I believed. I felt that he — you know, I think that it's important to understand that in communicating between police constables and detectives who were investigating homicides that the constables typically don't put the questions to the detectives.
>
> We answer the questions, and if you are perhaps guilty of some misconduct, in other words, if you've, as in

> this instance, you've thrown a cigarette away where you shouldn't have, or something along these lines, and you attempt to deny your responsibility for that, it's not something that I would have done. I was prepared to accept responsibility for something I had done, but I wasn't convinced I had done it, I suppose is the best way to describe it, at least I wasn't convinced, because I didn't have enough information to completely convince me that the butt he was talking about was mine.
>
> So I went to the meeting, I did not want to give the appearance of trying to deny responsibility for it, and I'm sure that influenced me when I had my conversation with him.

Fitzpatrick and Cameron then attended the meeting with the Crown attorneys, Mr. Scott and Ms. MacLean. Present at this meeting, in addition to Cameron and Fitzpatrick, were Officers Chapman, Michalowsky, and Shephard. Officer Cameron discussed his evidence with them and included the general physical location where he had thrown away the butt. He was not informed when or where the butt was found. Officer Cameron's information was that the butt which was found was obviously fresh, and could not have been left at the scene by a killer three months prior to its discovery. Detective Fitzpatrick told Officer Cameron that, in his opinion, the butt was a 'red herring' and that it was irrelevant to the prosecution of Guy Paul Morin. Cameron testified that he came to understand that the defence might potentially use the unaccounted for cigarette butt to mislead a jury into believing that the real killer had left it.

Testimony at the First Trial

The next day, on January 13, 1986, Officer Cameron testified at the first trial. He recounted the events of the search. He was asked no questions in relation to the precise location where he had actually butted his cigarette,[2] but testified during questioning by Mr. Scott that he smoked Craven Menthol cigarettes. In cross-examination by Mr. Ruby, Officer Cameron agreed that he really did not know whether or not the cigarette butt that was found was

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[2] He testified in chief that after he passed Constable Fox he walked down the lane and realized that he was approaching an area where he should not be smoking. He butted the cigarette and threw it to the side of the path.

his.

Detectives Shephard and Fitzpatrick testified during the Inquiry that they were aware prior to the first trial that the cigarette butt found at the scene had been lost, but was subsequently found by Sergeant Michalowsky. They recalled being told that Sergeant Michalowsky had found the butt under a flap of a cardboard exhibit box.

On January 10, 1986, during the first trial, Sergeant Michalowsky produced a cigarette butt encased in a plastic envelope. On the tag, under "description of property," was the notation "cigarette butt — 20 to 30 feet north of roped-off area west of laneway may have been dropped by Constable T. Cameron." Sergeant Michalowsky testified that the butt was found 20 feet north of the "deceased" and 8 feet west of the west edge of the laneway. When Sergeant Michalowsky, who testified immediately prior to Officer Cameron, was asked during the first trial who had found the cigarette butt, he replied: "This is a note I did not make, sir. I don't know the officer's name who found that cigarette butt."

At Mr. Morin's first trial, Inspector Shephard, at the request of Clayton Ruby, purchased a package of Craven Menthol cigarettes. The cigarette butt tendered at trial and a Craven Menthol cigarette were compared. It was determined that the butt tendered as evidence was *not* a Craven Menthol cigarette.

Cameron and Michalowsky's Drive Home

Officer Cameron drove back to Durham with Sergeant Michalowsky after his testimony. Cameron described Sergeant Michalowsky's demeanour as friendly and happy to talk with him. Sergeant Michalowsky did not have any difficulty, in Cameron's observation, about speaking of events connected to the trial. During this ride, Cameron and Michalowsky had a conversation about the cigarette butt. Again, Michalowsky did not offer any information to Cameron about the location of the butt. It appeared to Cameron that Michalowsky was attempting to provide him with a little fatherly advice or assistance with respect to his evidence. During their conversation, Officer Cameron asked Sergeant Michalowsky when the butt was found. From Michalowsky's response, Cameron came to believe that it was found *prior* to his arrival at the scene: he concluded that it was not possible that the butt was his. Cameron testified about this conversation:

> He asked me if — firstly, he said, actually, something along the lines of: We all made mistakes and don't worry about it, and this kind of thing. And then he asked me if I minded if he used my humiliation, is the word he chose, when he was training police recruits in the area of crime scene protection.
>
> In other words, not only did I get to feel embarrassed in Court, I now got to be a bad example for police recruits, which I wasn't keen on, and so I asked him not to do that.
>
> .....
>
> And if there had been any doubt in my mind before about pursuing this issue of the cigarette butt, that cemented it for me there. At that point in time, I think, needed to know was this or was this not my cigarette butt, and that's when I discussed with him the time that it was found.

During his second trial testimony, Michalowsky claimed he had no memory of this conversation with Officer Cameron.

Following his ride home with Sergeant Michalowsky, Officer Cameron said he contacted Ms. MacLean and Detective Fitzpatrick to tell them that he no longer believed that the cigarette butt was his. While he could not be specific as to when he contacted these individuals, he testified that it was within a week or two of his conversation with Sergeant Michalowsky on January 13, 1985. (The trial ended on February 7th.) Officer Cameron told the Inquiry that, to the best of his recollection, the telephone conversation between himself and Ms. MacLean took place when Ms. MacLean was in Durham, as opposed to being in London. While he had previously testified that he did not believe that the first trial was yet over in London when he telephoned her, he was unable to state definitively at the Inquiry when he had contacted the Crown and the police officer, but maintained it was shortly after the ride. He told them that he had learned through his conversation with Sergeant Michalowsky that the cigarette butt had been found prior to his arrival. He recalled Ms. MacLean telling him not to worry about it since he had not definitively testified that it had been his cigarette butt in the first place and that, in fact, it had been "pretty well established" that it was not his butt. In essence, Officer Cameron said that Ms. MacLean stated "that it just wasn't important." As will be more fully explored below, Ms. MacLean

denied that Officer Cameron communicated with her at this time.

Officer Cameron added that he spoke with Detective Fitzpatrick at about the same time as he spoke with Ms. MacLean. Detective Fitzpatrick confirmed that Cameron had telephoned him expressing concerns about his evidence at the first trial when it was suggested that he was responsible for the cigarette butt found at the scene; however, Fitzpatrick denied receiving this call before the end of the first trial:

> I don't recall him mentioning to me during the first trial while the trial was on. I can't give you a specific date, and I'm sure if he had, that I probably would have brought it to the Crown's attention, and if he mentioned it to the Crowns, I'm sure that they would have done something about it. I remember Cameron mentioning something to me about it, the date I can't give you, but I seem to recall it was probably after the trial.

Officer Cameron did not hear anything more about this issue after he had spoken with either of these individuals until March 1990.

March 9, 1990, Meeting of MacLean and Cameron

On March 9, 1990, Officer Cameron was interviewed by Ms. MacLean to prepare for Mr. Morin's upcoming second trial. Officer Cameron said that he reiterated, during this meeting, that it was not his cigarette butt. He also reminded her at this time that he had already told her this in 1986:

> I'm sure I said to Sue: Well, look — you know *as I told you before* I didn't arrive there until 4:58.
>
> And that was, *you know, we talked about that*, I'm sure. I don't specifically recall all the details of the conversation, but that's what it related to. (Emphasis added.)

Officer Cameron further testified that Ms. MacLean told him during this conversation that she did not recall him ever bringing this to her attention earlier.

Ms. MacLean maintained that the first time that she heard that a cigarette butt had not been discarded by Cameron was during their interview

of March 9, 1990. She disagreed that Cameron had told her this near the end of the first trial or during 1986.

On September 24, 1990, during the stay motion, Ms. MacLean testified about her meeting with Cameron:

> Q. When you realized that what Sergeant Cameron was telling you didn't fit with what was in Sergeant Michalowsky's note book?
>
> A. I was very concerned [b]ecause it appeared as though in the conversation on the way back from the trial, the first trial, Sergeant Cameron was saying things — excuse me — Sergeant Michalowsky was saying things to Constable Cameron that didn't make sense at the time. *And this was the first I had heard about it, was in March of this year.*
>
> .....
>
> Q. Do you recall any question coming up as to where these photographs were taken, where the butt was found in relation to the body?
>
> A. No, I don't recall that being discussed, the location of the butt, *because the first time that I really heard about it was from Sergeant Cameron on March 9th this year [1990],* about the location issue. We all assumed it was his cigarette. (Emphasis added.)

Ms. MacLean testified at the stay motion about her conversation with Officer Cameron on March 9th, 1990:

> Q. Did you ask Sergeant Cameron if he had spoken to any other police officers about this problem, whether before or after the meeting or since the trial, whether he had spoken to anyone about his conversation with Sergeant Michalowsky after the trial in which he realized it may not have been his cigarette butt that was found at the scene.
>
> A. Yes, because I was concerned about why it hadn't been brought to our attention while the trial was still in progress. So I asked him if he'd told anyone and *he said he thought he had but he didn't remember who. It wasn't me, but I don't know* —. (Emphasis added.)

On January 25, 1991, during the preliminary inquiry into Sergeant Michalowsky's charges, Ms. MacLean gave this evidence:

> Q. Do you ever recollect Sergeant Cameron ever coming to you immediately after the first trial in January 1986?
>
> .....
>
> A. No. He told me — when he told me about his concerns about the conversation with Michalowsky in the car?
>
> Q. Yes, that's coming back from the trial.
>
> A. On - on - right, on the March 9th meeting, I asked him right away: Did you tell anyone about it?
>
> Q. Yes.
>
> A. Because obviously the trial was still ongoing.
>
> Q. Yes.
>
> A. And if he knew it wasn't his cigarette butt, or thought it wasn't, why, you know...
>
> Q. Right.
>
> A. [w]hat we were doing at that first trial, basically?
>
> Q. That's my point.
>
> A. Right, and he said he had told *somebody* at the time.
>
> Q. Who did he say he told?
>
> A. *I don't know. I don't — I mean, it would have been either a Crown or Staff Sergeant Fitzpatrick or Inspector Shephard.*
>
> Q. But he told you in March of 1990 that at some point immediately after his testimony in London in 1986 that he told someone with respect to the prosecution.

> A. *Yes. I don't remember being told. The first I heard about it was when he told me in March.*
>
> Q. I'm not suggesting it was ...
>
> A. *No, well, I mean I don't know if he'll say he told me*, but if I don't recall ever being told that information before March 9th, 'cause I think I would have acted on it as I did in March of 1990.
>
> Q. And yet he told you in March of 1990 that immediately after his testimony on the day, the very day he testified he had some misgivings about his testimony at that time.
>
> A. On the ride back which is the — I guess the day he testified.
>
> Q. Right.
>
> A. Or the day after. I'm not sure when they drove back, and I don't know when he said he told somebody about it but it was at the time of the trial. Like, I don't know if he — he didn't say 'I told them' you know, [t]he next day I phoned somebody or whether it was a few weeks later, or what. I don't know.
>
> Q. But you - your impression was, it was while the trial was ongoing in London?
>
> A. That was my impression, yes. (Emphasis added.)

It was not suggested to Ms. MacLean during her testimony at Michalowsky's preliminary inquiry that Officer Cameron specifically said he had contacted her. As she was an excluded witness (and provided testimony before Cameron), MacLean claimed that she was unaware that Cameron testified at Michalowsky's preliminary inquiry that he telephoned her in 1986 about his conversation with Michalowsky.

Ms. MacLean's position is that she only became aware that Cameron claimed during his cross-examination at Mr. Morin's second trial that it was she whom he contacted. She said that she did not review this area with him during her preparation of Cameron for his trial evidence. She told the Inquiry that she was quite surprised by his evidence because she thought his position had always been that he did not know whom he contacted.

As will be discussed more fully below, Ms. MacLean was the Crown attorney who called Officer Cameron's evidence during Mr. Morin's second trial. Counsel for Guy Paul Morin alleged that Ms. MacLean's interventions at the second trial during Cameron's cross-examination by Mr. Pinkofsky made it clear that she had already read Cameron's earlier evidence from Michalowsky's preliminary inquiry. Accordingly, it was his position that Ms. MacLean was, therefore, familiar with the contradiction between her recollection and his.

In the midst of Cameron's cross-examination by Mr. Pinkofsky, his evidence at Michalowsky's preliminary inquiry relating to the cigarette butt was put to him:

> Q. And you contacted either one of them, either Detective Fitzpatrick or Ms. MacLean, very close to the date that you testified, very soon after you testified?
>
> A. I talked to both of them at different times, and I can't recall just how soon it was to the date I testified. It was not long after.
>
> Q. So is that a fair way to put it, that you can't ... you can say that it was very close to the date that you testified, and very soon after you testified?
>
> A. I believe that it was soon after. If those are my words, I'm hedging a bit now on them, but I expect it was very soon after. I'm not certain just exactly when it was today.
>
> Q. All right, sir. And as far as you could remember, you contacted Detective Fitzpatrick and Ms. MacLean while the trial was pending, is that correct? While that original trial was still going on?
>
> A. I can't recall whether that was the case or not.
>
> Q. At page 133, line 25, sir, [of his testimony at Michalowsky's preliminary hearing] again, under cross-examination by Sergeant Michalowsky's lawyer, —
>
> A. What was the reference?
>
> Q. Page 133, line 25. Just to put it in context I'll start

off with the question at line 20:

> Q. And the very next time that you heard anything about the cigarette butt in relation to this case is when?
>
> A. (pause) ... This was after the trial or after I had given evidence at the trial.
>
> Q. Yes, sir.
>
> A. And the question was?
>
> Q. You indicated you spoke to Detective Fitzpatrick and Susan MacLean ...
>
> A. Yes.
>
> Q. While the trial was pending.
>
> A. Yes.

Were you asked those questions and did you give those answers?

A. Yes, I accept that I did.

Q. At the time, on February 8th, 1991, was that a true and correct memory of how soon after you testified on January 13th, 1986 you spoke to Detective Fitzpatrick and Sue MacLean?

Ms. MacLean: Your Honour, if I might, perhaps I can pass this to you. It's at page 131, line 27 at the bottom, there's a question and answer which I submit is part of this witness's evidence at the trial.

Mr. Pinkofsky: I'll agree to read that, Ms. MacLean, in fairness to you.

Ms. MacLean: All right, thank you.

The Court: Thank you.

Mr. Pinkofsky: Have you got, officer, have you got the questions and answers at page 133 in your mind?

A. Yes, sir, I do.

Q. Previously, Mr. O'Brien had asked you the following questions, sir. Perhaps I'll put it into context by line 20:

> Q. And, no doubt, you would want to report that immediately to both Sue MacLean and Detective Fitzpatrick because of that misconception?
>
> A. Yes.
>
> Q. And indeed you evidence is today that you did?
>
> A. Yes. That is correct, Sir.
>
> Q. To both of them?
>
> A. Yes.
>
> Q. And to the best of your recollection, it is while the Morin trial is still pending, before a resolution had been affected?
>
> A. I can't say that, Sir, only that it was very close to the date that I testified, very soon after.

Were you asked those questions and did you give those answers on February 8th, 1991?

A. Yes, I believe I did.

Q. Were those answers true and correct at the time you gave them?

A. Yes.

Q. Are they true and correct today?

A. Yes, they are true.

Q. Are the questions and answers that you gave at page 133, that were read to you previously where you say you indicated you spoke to Detective Fitzpatrick

and Sue MacLean, you were asked "while the trial was pending", and you answer: "Yes", were they true and correct at the time you gave them?

A. I believed them to be. I don't believe it now.

Q. You believed it on February 8th, 1991. You don't believe it now?

A. I suggest I was confused at that point. It was very late in the testimony. And I see the question and answer, and I realize I've answered that way. But I don't believe it to be correct today. I must have on that day or I wouldn't have given that answer.

Q. Yes.

A. Or misunderstood the question, or was confused, or something.

Q. Can you give me your best estimate, sir, in terms of days, how many days after you found out from, as a result of your conversation with Sergeant Michalowsky on the car ride home on January 13th, 1986, that it was impossible for that cigarette butt to have been yours, within how many days did you contact either Detective Fitzpatrick or Ms. MacLean?

A. I can't recall, sir.

Q. Can you give me an estimate, please, sir?

A. I can't even estimate it.

Q. You can't even estimate it?

A. Not with respect to number of days or, I don't want to be guessing and get it wrong.

Q. Yes. Tell me, sir, you must be aware today that Mr. Morin's trial commenced on January 7th, 1986, that on February 7th, 1986 the jury returned its verdict of not guilty, ending the trial. Are you aware of that today?

A. I accept that it's true. I'm aware of it now, I suppose.

Q. You mean, you didn't ... it didn't sort of catch you eye, all the media coverage that this trial originally —

Ms. MacLean: Well, Your Honour, the question was relating to the date, I mean —

The Court: Well, Mr. Pinkofsky, we have been through this before, and I think, by my count, that's the fifth time that's happened. Now I haven't mentioned it before.

Mr. Pinkofsky: With this witness, sir?

The Court: No, at this trial.

Mr. Pinkofsky: You're saying you had no awareness that that was approximately the time that Mr. Morin's trial ended?

A. I said I would agree with you on the date, sir, but I don't specifically recall the date.

Q. Did anyone, after you reported to Detective Fitzpatrick or Ms. MacLean, did anyone tell you that it would be necessary for you that you should return to court and testify again at that original trial to clear up the misconception about the cigarette butt?

A. It had, by that time, been cleared up by others. I was not asked to return, no.

Q. Sorry. What made you think it had been cleared up by others?

A. I was told this. I read an article in the Toronto Star the day following my testimony about something of an experiment that was done in the court room; and my concern about it waned somewhat when it seemed to have been established that it was likely not my cigarette butt. So this idea that it was impossible and that I should be contacting someone right away became less important because it appeared to have been established that it was likely not mine.

Q. So you followed the newspaper accounts to that extent?

A. I read it that day, yes.

Q. Yes. If you had reported it to Detective Fitzpatrick, let's say, while this trial was still going on, your conversation with Sergeant Michalowsky and your realization that the cigarette butt you testified about couldn't be yours, would you have considered it proper or improper for you not to have returned to court to testify to clear up the matter?

Ms. MacLean: Your Honour, excuse me, I am objecting on the basis of that being a purely speculative question.

The Court: Well it isn't this witness's responsibility in any event. You are not obliged to answer that question, officer. (Emphasis added.)

During Ms. MacLean's evidence before this Commission, she was questioned as to whether she had reviewed Cameron's evidence from the preliminary hearing:

Q. First of all, you suggested in answering Mr. Cooper's questioning that maybe you had not read Cameron's evidence that he gave at the preliminary hearing into Michalowsky's charges; remember that?

A. Yes, I've read it now. I don't remember reading it before he testified.

Q. I'm going to suggest to you, madam, it was available to you to read at the time. The Crown had a copy of the transcript.

A. I don't know if we did. That's what I'm saying. I know that Mr. Pinkofsky did use it in cross-examination. I don't know if we had a copy or not.

Q. I'm going to suggest to you further that at one point, you suggested that perhaps it wouldn't have been — or you seemed to suggest it may not have been proper for you to read it because you'd been a witness at the same proceeding. Of course, by this time, Michalowsky's proceeding was over.

A. No, I realise that. I said up until November, the

> stay was entered in November of '91. I think Officer Cameron testified in December.
>
> Q. Well he testified twice, in December and February.
>
> A. Yeah, but what I'm saying is, up to the first point when he testified, I know I would not have read any evidence from the Michalowsky prelim before the stay was entered because of my status there as a witness. And there was an order excluding witnesses.

Ms. MacLean's answers from Michalowsky's preliminary inquiry (wherein she claimed that he did not contact her) were read to Officer Cameron at the Inquiry. In relation to Ms. MacLean's position, he said:

> Her answer is not factually correct.
>
> .....
>
> She's forgotten that I called her [in 1986], and she's forgotten that I reminded her about it in March of 1990.
>
> .....
>
> She's forgotten or she's not telling all she knows.

Officer Cameron's position was that Ms. MacLean was told about his concerns shortly after his conversation with Sergeant Michalowsky in January 1986. Cameron testified that MacLean was further aware in March 1990 that he believed that he had telephoned her and Detective Fitzpatrick after learning this fact. This is Cameron's evidence at the Commission:

> [I]t has always been my contention and my knowledge and belief that I spoke to Sue MacLean, ... after I testified at the first trial. I understood that she was aware of this, that I believe that to be so. ... What you've just read to me that I didn't know who I had spoken to, that's not accurate, she's mistaken about that. I knew who I had spoken to.

During the Inquiry, the question of whether Cameron had told Ms. MacLean about his conversation with Michalowsky and that she had simply forgotten about this was discussed with her by Mr. Morin's counsel:

Q. Suffice to say, if he had told you on March 9th that it was you whom he told, which is what he's always maintained, not only that he said to you, but he said under oath on every occasion, as well. You could hardly have forgotten that; could you?

A. No, because I would have said to him: Well, it wasn't me. You didn't call me.

Q. So this is truly a direct conflict in evidence between you and he?

A. Yes. As I said, in my view, it seems to be an honest difference of recollection.

Q. Well, you've already conceded that you could not possibly have forgotten that he said to you, if he did say that. (sic) So it can't be an honest failure of memory on your part; correct?

A. No.

Q. Right.

A. But I'm saying I don't think that Officer Cameron's a liar so —

Q. There has to be an honest failure of memory on his part; that's the only way you can explain it.

A. That's my perception of it, yes.

Findings

To summarize, Constable Cameron attended at the body site on October 3, 1984 at 4:58 p.m. He butted out a cigarette while on duty. I find that it was not the butt found and bagged at the body site. That butt was located before Cameron arrived at the scene. It was of a different brand and was found in a different location than the butt Cameron had left behind.

Cameron testified on January 13, 1986. The position of the Crown was that the cigarette butt found at the scene could be explained by Cameron's actions. The Crown took this position in good faith.

Constable Cameron rode home with Michalowsky later that day. I

accept that Cameron concluded, from what Michalowsky said to him, that the cigarette butt found at the scene was not his.

Constable Cameron's recollection is that he contacted both Ms. MacLean and Officer Fitzpatrick to advise them that he no longer believed that the butt was his. His recollection is that he did so within one or two weeks of this conversation with Michalowsky. If so, this would have been during the first trial. Ms. MacLean would have been obliged to disclose this to the defence. Her response, as Cameron recalls it, was that this was not important as it was pretty well established that the butt was not his.

Officer Fitzpatrick did receive the call from Cameron, but believes it came after the trial had concluded. MacLean does not remember any such call; she would have taken action on it, she said, had the call been received during the trial.

Cameron does recall that he called Ms. MacLean in Durham. This might favour an interpretation that the call, if it took place, followed the trial, though Ms. MacLean was at home in Durham at times during the trial. As well, at the second trial, Cameron conceded that he could not remember whether the phone calls with Fitzpatrick and MacLean occurred prior to or after the first trial.

Cameron and MacLean each testified at the Inquiry that they respected the integrity of the other.

The evidence became more complex.

Cameron and MacLean met on March 9, 1990. Cameron recollected that he reminded Ms. MacLean that he had earlier spoken to her about this issue. According to him, Ms. MacLean said she had no recollection of it. Ms. MacLean's recollection of the March 9, 1990 meeting is very different. At the 1990 stay motion, she testified that Cameron indicated that he could not remember to whom he had previously given this information.

Cameron and MacLean later testified at Michalowsky's preliminary inquiry. Ms. MacLean testified to the same effect as noted above and added: "I don't know if he'll say he told me." Ms. MacLean denied that she knew that this allegation was forthcoming from Cameron, who was yet to testify at the preliminary inquiry.

The different recollections of Ms. MacLean and Constable Cameron became an issue at the second trial, when Ms. MacLean's ability to examine Cameron as a witness was challenged. That issue is addressed below. I should, however, say at once that I am satisfied that Cameron brought this matter to Officer Fitzpatrick's attention sometime in 1986, after his conversation with Michalowsky. I am unable to resolve the credibility issue between Constable Cameron and Susan MacLean.

March 14, 1990 Meeting of Susan MacLean and Officer Robinet

In March 1990, Michalowsky met with Sergeant George Scott who was in charge of the searches outside the roped-off area at the scene. Michalowsky stated that he was concerned that some people were saying that he had "messed up the examination of the scene." Michalowsky then told the officer that his doctor did not want him to testify.[3] On March 13, 1990, one of Michalowsky's doctors provided a letter documenting his hypertensive heart disease, concluding that, in his opinion, Sergeant Michalowsky should not participate in the trial due to his constant problem with fluctuating blood pressure.

Ms. MacLean testified that she learned from Detective Fitzpatrick on the morning of March 14, 1990 that Sergeant Michalowsky had shown him a doctor's letter. That letter, addressed to the Crown which stated, in part:

> It is my opinion that Mr. Michalowsky should not participate in such a trial. Should he do so, it is my opinion that he would expose himself to a potentially dangerous situation physically.

On the afternoon of March 14, 1990, Officer Robinet met with Ms. MacLean at a meeting set up for the purpose of preparing for his anticipated evidence at trial. Robinet brought the Jessop file, a box of material left behind by Sergeant Michalowsky, who was away on sick leave. In this box were

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[3] In July 1986 Sergeant Michalowsky underwent cardiac surgery. He returned to work in October 1986 and continued in the Identification Bureau for several months. In January 1987 he was transferred to the Youth Bureau. It was not until August 30, 1989, that Michalowsky became re-involved in the Morin case when he met with Inspector Brown, the officer-in-charge of the Durham Regional Police Service Criminal Investigation Branch. At this time he spent many hours reviewing evidence and studying transcripts to be ready for the trial.

photocopies of three pages of notes written by Sergeant Michalowsky. The discovery of these notebook pages during this meeting led to the realization that Michalowsky had a duplicate notebook; this initiated the commencement of a criminal investigation, resulting in charges against him.

According to Ms. MacLean's evidence at both Mr. Morin's stay motion and at the Inquiry, she told Officer Robinet at this meeting that the Crown may not be able to call Sergeant Michalowsky due to health concerns. She inquired of Robinet as to whether he could fill in any of the gaps in the event Michalowsky was not available to testify. Officer Robinet told her that he had arrived at the scene on December 31, 1984, too late to be of much assistance, as all the exhibits had been seized and bagged and the body had already been removed.

Ms. MacLean testified that she asked Officer Robinet about his knowledge of the cigarette butt which was an issue in the proceedings. Robinet indicated that he had no knowledge about this. The discussion of the cigarette butt led MacLean to recall a meeting she had with Michalowsky in August 1989, during which Ms. MacLean had received a copy of Michalowsky's notebook. She asked Officer Robinet for a copy of his own notebook. While Robinet was looking through the box for his notebook, he came across the three pages out of Sergeant Michalowsky's notebook. He handed these pages to Ms. MacLean and said, "Well, here, why don't you compare this to what you've got." According to Ms. MacLean's evidence at the Morin stay application (and at the Inquiry) at some point Robinet told her that Sergeant Michalowsky may have another notebook. In his evidence at the Inquiry, Constable Robinet could not recall saying this, but he did not dispute it. When Ms. MacLean looked at the three pages, she realized that they differed substantially from the pages of what she believed was Sergeant Michalowsky's only notebook on the issue. These pages (subsequently determined to originate from Sergeant Michalowsky's second notebook) clearly referred to Officer Cameron stating at the scene on December 31, 1984 that the cigarette butt belonged to him. (Cameron had told MacLean that until the December 27, 1985 meeting, he did not know the cigarette butt was an issue.) Officer Robinet testified that Ms. MacLean appeared extremely upset and he, himself, was somewhat shocked and bewildered.

Aspects of the discussions between Ms. MacLean and Officer Robinet on March 14, 1990 became an issue at both Mr. Morin's second trial and at the Inquiry. In particular, Officer Robinet denied, in cross-examination at the

second trial, that in the course of that meeting:

- Ms. MacLean told him that the purpose of the meeting was to determine whether he could fill in some of the gaps to "avoid" having to call Sergeant Michalowsky.

- Ms. MacLean told him that the Crown may not be able to call Sergeant Michalowsky due to health concerns.

- He told Ms. MacLean that he had arrived at the scene on December 31, 1984, too late to be of much assistance as all the exhibits had been seized and bagged and the body had already been removed.

- Ms. MacLean inquired as to what he knew about the cigarette butt and Officer Robinet said he did not know anything about it.

During the Inquiry, Officer Robinet said that although he had no specific recollection of his discussion with Ms. MacLean, he did not dispute that the above matters may have been discussed.[4] He could not explain what had changed since his denials at the second trial.

During cross-examination at the Inquiry, Officer Robinet further testified as follows:

> Q. [Fuerst] Am I correct that Ms. MacLean told you that Officer Michalowsky was apparently experiencing some serious health problems?
>
> A. [Robinet] Yes, I believe that happened.
>
> Q. Am I correct that she advised you that she advised you that she wanted to canvass information with you to determine whether you would be able to give any of the same evidence as Officer Michalowsky, in case he was too ill to testify?

---

[4] Although he did not understand the Crown to be attempting to "avoid" calling Michalowsky.

A. Yes, I believe that's so.

Q. Am I correct that during the course of your meeting, the topic of the cigarette butt at the scene came up?

A. It probably did, yes.

.....

Q. You recall talking to Ms. MacLean about the cigarette butt?

.....

A. I can't remember talking to Ms. MacLean, but I can't say for certain that the cigarette butt came up, it probably did.

Q. You don't have any reason to disagree if she's made a notation that that's what was discussed; do you?

A. No, I don't.

.....

Q. And do you recall Ms. MacLean indicating to you that there was something in Officer Michalowsky's notebook about the cigarette butt that was causing her concern at that point?

A. I'm sorry, I don't recall that, but I'm not disputing it.

Q. So again, if that's her position, you don't have any reason to disagree, do you?

A. No.

Robinet's Prior Knowledge of Duplicate Notebooks

On April 3, 1990, Officer Robinet advised the Ontario Provincial Police that he was aware Michalowsky had prepared two notebooks in connection with the case. He subsequently testified at the stay motion that he observed Sergeant Michalowsky sitting at his desk copying a notebook into

another notebook during a period after the preliminary hearing and shortly before the first trial — late 1985 or early 1986. This is in conflict with Michalowsky's subsequent evidence at the stay motion that he had prepared his new notebook at his residence at the kitchen table.

Officer Robinet said that he was not aware that the two notebooks were markedly different from one another — though they covered the same periods of time. He testified that he did not find the existence of two notebooks strange or untoward as Michalowsky told him at the time Robinet observed him writing the second notebook, that he wanted to have everything in one notebook to be organized for the trial. Michalowsky made a comment to him that he had been flipping back and forth from date to date during the preliminary hearing and could not find things quickly. It was Robinet's understanding that Michalowsky was transcribing everything verbatim from his initial notebook into the second notebook. It was also his assumption that Sergeant Michalowsky's original notes would also be presented at trial.

Officer Robinet testified that he did not realize until his meeting with Ms. MacLean that the photostatic copies of Michalowsky's notes did not conform with the copies Ms. MacLean had in her file. Despite his knowledge of the existence of a second notebook, Officer Robinet did not, at that time, tell Ms. MacLean that he had previously seen Sergeant Michalowsky rewriting his notes. In his evidence at the stay motion and at the Inquiry, Officer Robinet explained that it just did not enter his mind. It was not until his interview by the OPP that Officer Robinet said, for the first time, that he was aware Sergeant Michalowsky had two notebooks. (At that time he indicated that Sergeant Michalowsky rewrote his notes from his day-to-day notebook for organizational purposes.) Officer Robinet also told police on April 3, 1990 that he thought Officer Cameron had claimed ownership of the cigarette butt at a meeting in late December 1985, and that at some point he heard that the butt could not be found.

Shortly after the discovery of the three notebook pages, Ms. MacLean terminated the interview with Officer Robinet. According to Ms. MacLean, she cautioned Officer Robinet not to discuss this matter with anyone. She did so, she testified, because she did not want interference in a potential investigation. She then went to speak with Mr. Scott, who surmised that there could be a legitimate reason an officer could have a second set of notes. They could be rough notes used and then another notebook was better organized for trial. He suggested that Ms. MacLean not confront Sergeant Michalowsky

directly with the notes during her pre-arranged meeting with him the following day, but to ask him whether he had any other rough notes or rough notebooks.

On April 12, 1990, Officer Robinet attended at Sergeant Michalowsky's home. He did so upon being instructed by Inspector Shephard to set up a meeting with Michalowsky to determine whether there were other photographs which had not been disclosed to the defence. At this time, Officer Robinet told Sergeant Michalowsky of his production to Ms. MacLean of the three pages from his notebook. At the stay motion, Officer Robinet testified that Sergeant Michalowsky told him he had been interviewed by the OPP about having two notebooks and that he had written the second notebook to be more organized. Robinet's evidence at the Inquiry was that he did not believe he discussed with Michalowsky the fact that the entries in the two notebooks were different.

March 15, 1990 Meeting of Susan MacLean and Officer Cameron

On March 15, 1990, Ms. MacLean conducted another interview with Officer Cameron. At this time she showed him the three pages from Michalowsky's notebook that were supposedly made on December 31, 1984 which contained the following notation:

> Cigarette butt located in area approx 20 - 30 feet north of the ropped-off [sic] area - west of edge of laneway.
>
> Was advised by an officer in near proximity that it had been "butted" by him — it was his — it had been photographed and bagged — may have been lost. Tom Cameron who said it was his - not sure then claimed it was his.
>
> All told to put their refuse in a Litter-Bag hanging off left side mirror of Ident Van.

Officer Cameron vehemently denied any such conversation with Sergeant Michalowsky at the body site. *I accept his evidence in this regard.*

Ms. MacLean and the 'Conflict'

Upon reporting to Mr. Scott after her meeting with Michalowsky on

March 15, 1990, Mr. Scott instructed Ms. MacLean to contact Inspector Edward Wilson, Sergeant Michalowsky's direct supervisor. She and Mr. Scott met with Superintendent Alex McMurray and Inspector Wilson on March 16, 1990. As it was apparent that there would be an investigation into Michalowsky's two notebooks, Mr. Scott asked Ms. MacLean to prepare notes on this matter for the Crown's Regional Director.

Ms. MacLean prepared handwritten and typewritten notes, both dated March 16, 1990, together with a will-say prepared by her on March 28, 1990, in connection with the OPP investigation.

Ms. MacLean's handwritten notes (Exhibit 161) reflect that on March 9, 1990, Cameron advised her of the conversation that he had with Michalowsky returning from London during the first trial:

> The first [Cameron] knew that a cigarette butt was important was when he was at a pre-trial meeting [December 27, 1985] at 18 Division (before the first trial) and John Scott asked if anyone had been smoking. He [Cameron] was very embarrassed, but after the meeting went up to John Scott and told him about his, (Tom's) cigarette.
>
> .....
>
> It has always been my recollection that until Tom came forward *at the meeting* just before the trial in 1986, no one knew whose butt was found at the scene. (Emphasis added.)

These notes are in conflict with Ms. MacLean's earlier contemporaneous notes of the December 27, 1985 meeting and the recollection of Cameron (and some others) that he did not come forward that day.

The position of counsel for Mr. Morin was that the changes in the later versions of these documents evidenced an aborted attempt on the part of Ms. MacLean to account for the cigarette butt by supporting the theory that Cameron had taken responsibility for it as early as December 27, 1985. Ms. MacLean's evidence on this issue is somewhat confusing. She said that when writing these notes on March 16, 1990, she was not only attempting to remember what Cameron had told her, but was also trying to record as much

as she could recall about the events of the prior week and the issues then raised. She explained that portions of her notes reflected her own memory as well as what she had been told by others. She stated that she did not have access to her notes prepared in 1985 when she prepared this note. She said that her memory was faulty on this point and conceded that her March 1990 notes were in error.

As discussed above, in 1992 Ms. MacLean led Officer Cameron through his evidence at the second Morin trial.

At the outset of Officer Cameron's evidence, Mr. Pinkofsky made the following statement to the Court:

> [T]he next witness [is going to be] Officer Cameron; and that Ms. MacLean is not only going to be present but is going to be conducting his examination. And I want to put that on the record that an area of cross-examination will directly involve questioning of this officer with respect to conversations that he had, or that he proposes to have had with Ms. MacLean concerning the question of the cigarette butt issue.
>
> [The Court]: Thank you. Ms. MacLean are you aware of this problem?
>
> [Ms. MacLean]: No, this is the first time I've heard about this before we reconvened. In fact, I spoke with Mr. MacGuigan and Mr. Smith about my leading Officer Cameron's evidence and it was agreed that I should do so.
>
> [The Court]: Well that's been considered by the Crown?
>
> [Ms. MacLean]: Yes.
>
> [The Court]: Are you prepared to do it?
>
> [Ms. MacLean]: Yes, I am.

Ms. MacLean told the Inquiry that she thought the defence's objection related to her general preparation with Constable Cameron on March 9, 1990. *She claimed that she was unaware, at the outset of Cameron's evidence, that he would take the position that he telephoned her following his conversation*

with Michalowsky. She said that at no time had she known or had it been suggested to her that she had a conflict of interest in relation to being advised of, and not taking the appropriate steps about, Cameron's alleged disclosure to her in 1986.

Mr. McGuigan's recollection was that the defence counsel's objection to Ms. MacLean leading Constable Cameron's evidence related to the fact that she had generally prepared Cameron to testify. Mr. McGuigan's position was that there was nothing distinguishing that situation from any other witness prepared by a member of the prosecution. He testified at the Inquiry that he did not know if he was cognizant exactly of what Mr. Pinkofsky was complaining about at that time. Mr. McGuigan, too, noted there had never been any suggestion by the defence that Ms. MacLean would be a potential witness.

Officer Cameron told the Inquiry that it had not occurred to him, before he provided this evidence, that there was anything inappropriate or odd about this. At some point he felt it was unusual that Ms. MacLean was the Crown attorney calling his evidence considering her involvement in the issues. As discussed earlier, during his cross-examination he stated that he had telephoned Ms. MacLean in 1986 after his conversation with Michalowsky. During the Inquiry he agreed with counsel for Mr. Morin that, in retrospect, it was completely inappropriate for Ms. MacLean to call his evidence as it could potentially have an impact upon an evaluation of her conduct.

At the conclusion of Cameron's testimony on December 12, 1991, Ms. MacLean conducted a brief re-examination, but did not touch upon Cameron's evidence relating to the conversation he allegedly had with Ms. MacLean. In her evidence before this Commission, Ms. MacLean could not specifically recall the discussions with her co-counsel as to whether she should or should not conduct the re-examination.

Cameron was recalled two months after his December evidence, at the request of the defence, to address certain issues relating to Detective Fitzpatrick's evidence. At this time, Ms. MacLean asked Officer Cameron, in re-examination:

> Q. Sir, can you tell us today whether or not those conversations [relating to information obtained on his

> ride home with Michalowsky] with myself or Staff Sergeant Fitzpatrick occurred before or after the first trial ended?
>
> A. I cannot remember ma'am.

Ms. MacLean testified that she spoke to Mr. McGuigan and Mr. Smith about her conflict:

> The decision was made by us that I would not — we wouldn't contradict him. We wouldn't challenge him on that point of the phone call, because then we would be making me a witness. But his evidence had been that he wasn't sure if it was before or after the first trial, so in re-examination, I limited it to: 'Well, are you sure whether it was before or after?' and he said: 'I don't know.' That's the gist of it. But I remember talking with Alex and Leo at the time and saying: "Well, what do I do?'. I mean here I am leading him, he's saying something I disagree with, and we just chose, we would have to — I guess the expression is, wear it, and not challenge him on that.[5]

Ms. MacLean admitted during the Inquiry that she should not have conducted this re-examination:

> I guess the only thing I can think is that in terms of the jury, they wouldn't understand why suddenly another lawyer was taking over that witness when I had handled him. But it was a very difficult situation.

She also said this:

> I mean now, looking at it, I shouldn't have, being alive to that issue, I shouldn't have done it. I guess the only thing I can think is that in terms of the jury, they wouldn't understand why suddenly another lawyer was taking over that witness when I had handled him [originally]. But it was a very difficult situation.

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[5] McGuigan was emphatic that this issue was never discussed.

Findings

I previously reflected on the difference in recollection between Constable Cameron and Susan MacLean. The issue became a significant one at the second trial. Ms. MacLean tendered Cameron as a witness. However, Cameron was bound to be cross-examined by the defence on his discussion with Michalowsky, his resulting telephone calls with Fitzpatrick and MacLean, and his conversation with MacLean on March 9, 1990. Since Cameron and MacLean's recollections were materially different, it was a conflict of interest for MacLean to examine Cameron herself. Indeed, the difficulty was manifest when Cameron was asked by MacLean in re-examination whether the conversations relating to the ride home with Michalowsky were made with MacLean or Fitzpatrick prior to or after the second trial.

Had Cameron given the same answer that he gave here (namely that he thought the calls took place shortly after the ride home, within a week or two), it would have reflected on his own questioner, Ms. MacLean.

Counsel for the Morins raise serious questions about Ms. MacLean's evidence on this issue. Cameron did testify in February 1991, at Michalowsky's preliminary inquiry, that he reported his conversation with Michalowsky to MacLean and Fitzpatrick prior to the completion of the first trial. During his cross-examination at the second trial, he no longer was prepared to swear that the calls took place prior to the end of the first trial. He said that he had been confused when he testified at Michalowsky's preliminary inquiry. He no longer believed it to be correct, or he "misunderstood the question or was confused or something." At the Inquiry, he testified that he did not believe that it was more than a week or two after the ride home that he spoke to MacLean, and he denied that MacLean had made it clear to him that his answers at the Michalowsky preliminary inquiry had implicated her. However, he conceded that he

> could very well have been affected by things I'd heard and didn't want to testify with the same degree of certainty if I wasn't certain in 1992.

It is MacLean's position that she did not appreciate there was a problem, even though it appears to have come to Cameron's attention. She claims that the contradiction did not come out when she prepared Cameron

to testify on the cigarette butt issue. She was not alive to the contradiction, although she appeared to have had the preliminary inquiry transcript when Cameron testified at the second trial and intervened to ensure that appropriate passages were read to Cameron in cross-examination. (She indicated that she had not read the transcript in advance, in part because she had not originally been designated as the Crown to examine Cameron.) Finally, she was not alive to the contradiction although Mr. Pinkofsky objected to her presence at the beginning of Cameron's evidence, as Cameron would be questioned about conversations "he had, or he professes to have had with Ms. MacLean concerning the question of the cigarette butt issue." (She indicated that she thought he was referring to unproblematic discussions in 1990, which should not have disqualified her.)

The evidence is not clear, cogent and convincing that Susan MacLean knew that Cameron would contradict her when he testified. Once the contradiction was revealed, Ms. MacLean should not have re-examined Cameron. I accept her evidence that she was advised that she could do so after consultation with Mr. McGuigan and Mr. Smith. It was no answer that Cameron would not be challenged on the conversation having taken place, but only questioned on its timing. Cameron was obviously reluctant to hurt Ms. MacLean's position in any way; the fact that she was the questioner could reasonably be expected to colour — not necessarily consciously — his testimony. Ms. MacLean conceded that she should not have conducted that re-examination.

(xiii) Michalowsky's Conduct and the Morin Prosecution

Michalowsky's Attendance at the Stay Motion

Michalowsky was called as a witness by the defence at the stay proceedings. As was summarized in Mr. Morin's Statement of Fact and Law to the Ontario Court of Appeal, by agreement of counsel and with the concurrence of Michalowsky's physician, Dr. Rowsell, his evidence was heard in the barristers' lounge at the London court house. Counsel and the trial judge wore business suits. Everyone sat on sofas and armchairs. Michalowsky provided evidence on the stay motion from June 25 to 29, 1990.

Mr. Gover, the Crown attorney at the stay motion, expressed his

scepticism to the Inquiry as to whether Michalowsky was too sick to testify:

> I don't think that as long as I was involved in the case that the view [among the Crowns] changed from the view that I held and Mr. Smith held initially, and that was that Sergeant Michalowsky was faking it.

Mr. Gover said that Michalowsky's demeanour at the stay motion in the presence of the judge differed from his demeanour when the judge was not present:

> I did have a concern that he — that although he appeared to be, for example, breaking down into tears whenever Mr. Pinkofsky started touching on an area where Mr. — pardon me, Sergeant Michalowsky could be seen to have some culpability and that he laughed and smiled in the absence of the judge, that nonetheless, there may be something in his medical history that a real concern about his ability to testify.

The Investigation by the Ontario Provincial Police

Sergeant Michalowsky had, indeed, prepared two notebooks pertaining to the Jessop investigation. His original notebook (notebook No.1) stopped at the conclusion of the preliminary inquiry in June 1985. Michalowsky's notebook No.2 purported to extend to the entire investigation, including the events of December 31, 1984.

In April 1990, the OPP reviewed the two notebooks of Sergeant Michalowsky and prepared a report noting the differences in them. Notebook No. 2 contained considerably more detail than notebook No. 1. In addition to being more comprehensive, the detail itself varied from that included in the first notebook. The report of the OPP noted, *inter alia*, the following discrepancies between the two notebooks:

- Notebook No. 2 includes a time of arrival and more descriptive wording as to the location of the body site;
- Notebook No. 2 includes a more detailed description of weather conditions;
- Notebook No. 2 lists officers not mentioned in

notebook No. 1;

- Notebook No. 2 has more detailed, specific and differing measurements than notebook No. 1; notebook No. 1 indicates that the body was 372 feet south of the south edge of the Fourth Concession, whereas notebook No. 2 measured 272 feet;

- Notebook No. 2 identifies the time certain exhibits were found and includes a more precise description of certain exhibits;

- Notebook No. 2 contains a drawing of the crime scene including measurements that differed from notebook No. 1;

- Notebook No. 2 details the officers searching and describes the location in which the cigarette butt and empty milk carton found by Kapuscinski were found. Notebook No. 1 has no mention of the cigarette butt;

- Notebook No. 2 reports that Tom Cameron stated that the cigarette butt was his and had been butted by him. There was no mention of any such detail in notebook No. 1;

- Notebook No. 2 contains much more descriptive information of fingerprint tests done on some of the evidence received including the recorder, milk carton, broken glass. The analysis of fingerprints described in Michalowsky's notes had not yet been done on that date;

- Notebook No. 2 contained more descriptions on the examination of the clothing and eliminated the entry from notebook No. 1 that all buttons from the victim's clothing had been accounted for;

On April 4, 1990, Sergeant Michalowsky was interviewed by the OPP officers. At this time, he discussed the cigarette butt and stated:

> *Prior to the preliminary trial*, it was thought by myself that the cigarette butt would not be an issue due to the fact that an officer by the name of Tom CAMERON, who was a member of the search party at the crime scene had admitted that the cigarette butt that had been located and photographed and retained might well have been his. He admitted to smoking during the search I recall at the time during that event, that all officers in the search were reminded of the seriousness and the importance of the search and were asked to discard any personal refuse in a bag that I had provided for them at the Ident van. Having transcribed in the book #2 after the preliminary trial and realizing the cigarette butt was an issue the information regarding the cigarette butt was entered into book 2. *It was never entered into book 1, because I felt it wasn't a piece of evidence pertinent to the investigation having been told that it may have been dropped by one of our own* men. The photograph relating to that cigarette was never withheld from the Court it accompanied all photographs taken at the crime scene and when questioned made reference to explain to the best of my ability. (Emphasis added.)[6]

Following the OPP investigation, Sergeant Michalowsky was charged in the late summer of 1990 (after his evidence at the stay motion) with:

- One count of perjury in stating under oath, in response to Mr. Justice Craig's question, that his notes (used to refresh his memory) were made contemporaneously, an offence contrary to section 132 of the *Criminal Code*;

- One count of wilfully attempting to obstruct, pervert or defeat the course of justice by preparing and testifying from a second notebook at the first trial, an offence contrary to section 139 of the *Criminal Code;*

- One count of wilfully attempting to obstruct, pervert or defeat the course of justice by tendering a cigarette butt at the first trial of Guy Paul Morin which he

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[6] Statement of Michael Michalowsky, dated April 4, 1990, to Det. Sgt. Mike Sharland and Sgt. Ralph Paul.

> falsely claimed had been seized in the vicinity of the body of Christine Jessop, an offence contrary to section 139 of the *Criminal Code*.

Michalowsky at the Second Trial

On October 16, 1990 (after Michalowsky's testimony on the stay motion), Ms. MacLean took notes of a tactical meeting attended by herself, Mr. MacGuigan and Mr. Smith, along with Sergeant Chapman and a police cadet. These notes contain a list of things to be done and they include the following comment: "Michalowsky — interview him with lawyer. — *how to make a lemon into lemonade*." (Emphasis added.)

Ms. MacLean testified that Mr. MacGuigan had used this expression in relation to Sergeant Michalowsky. She related the concern at the time about the effect Michalowsky's absence could have on the issue of continuity. (Her notes from an agenda for a later meeting on March 22, 1991 asked: "How do we minimize the damage caused by Sergeant Michalowsky's situation?")

Mr. MacGuigan, when asked during this Inquiry if there was a discussion about minimizing the damage caused by Michalowsky, said "I don't think it happened." He disagreed that the lemon-into-lemonade remark was his; he suspected it was a "personal observation by Ms. MacLean." Mr. Smith did not remember the comment.

Ms. MacLean told the Inquiry that while what Michalowsky did was wrong, the cigarette butt depicted in the photograph was still regarded by Crown counsel as a fresh one. Her own view was that Michalowsky had rewritten his notebook not with a view to seeing Mr. Morin convicted, but in order to look organized. Over the years of dealing with him he had impressed her as somewhat of a perfectionist who did not want to ever concede that he may not know the answer; in the course of rewriting his notebook he altered information. She further speculated that he discarded the cigarette butt at the time because he did not think it was relevant, producing one later when inquiries were made.

Mr. McGuigan disagreed that the Crown attorneys were of the view from the outset that Michalowsky presented a serious problem for the case. He said, however, that there was strong disagreement among them as to

whether Sergeant Michalowsky should be called. Mr. Smith was of the view that he should be called so that the jury could see he was not the monster Mr. Pinkofsky made him out to be; Mr. McGuigan thought that this was not an appropriate reason to call him. Given Ms. MacLean's status as a witness in the proceedings against Michalowsky, she did not involve herself in any significant way with the decision as to whether or not he would be called as a witness.

The Crown attorneys ultimately determined that they would not call Michalowsky as a witness. He was, therefore, subpoenaed by defence. As was the case at the stay motion, an application was made on May 14, 1992 by Michalowsky's personal counsel to quash this subpoena on the basis that his physical and emotional health did not permit him to testify. Several doctors who had examined Sergeant Michalowsky tendered evidence.

Mr. Justice Donnelly ruled that Michalowsky should testify, but that special conditions would, again, apply to his evidence (similar to those imposed during his testimony on the stay motion):

- Michalowsky's doctor was to sit beside him throughout his evidence, monitor his condition and advise as to the taking of recesses;
- No one, including the trial judge, would robe;
- No one could stand up during Sergeant Michalowsky's evidence, including the questioning counsel;
- Sergeant Michalowsky was to have his back to the audience and a screen was to be placed between him and the spectators;
- All counsel and the judge had to sit on the same level as Sergeant Michalowsky;
- Sergeant Michalowsky's evidence was to be videotaped.

On June 2, 1992, Sergeant Michalowsky testified at the second Morin

trial in accordance with the trial judge's ruling. Mr. Morin watched as Mr. Justice Donnelly, in the jury's absence, walked over to Michalowsky and shook his hand, stating:

> Sergeant Michalowsky, it's nice to see you again .... And I want you to understand, we want to make this as comfortable as we can for you. If you are in any stress or difficulty, I want you to let me know. All right? You can sit here by the Doctor. He's in charge. Okay?

As was noted in the Appellant's Factum: "*In the presence of the jury*, the *registrar* then warmly shook Michalowsky's hand prior to swearing him in."

The trial judge introduced Michalowsky to the jury in the following words:

> Members of the jury, our garb and orientation has changed since yesterday. The reason for that is Sergeant Michalowsky is about to testify. We are acting on medical advice that in some way we can make this less discomfiting and we are attempting to do that. Sergeant Michalowsky, if you are having difficulty I expect you to give us some indication and, for your information, this is Dr. Rowsell, who is seated beside Michalowsky, his internist and physician.

Mr. Michalowsky's evidence was extremely hard to follow as he claimed to have forgotten most of the events he was asked about. He testified: "I have been trying to obliterate this situation from my mind." At another point in his testimony he said: "I'm not sure of all of it. I'm not sure of anything. I'm really not sure why I'm even here."

Sergeant Michalowsky testified that he kept two notebooks, one for general occurrences, the second for a particular homicide. His reasoning for preparing another notebook was that he realized when providing testimony at Morin's preliminary hearing, that his homicide notebook was not as concise and organized as it should have been. As a result, he decided to get his notebook in chronological order in a way in which he could find items readily.

Michalowsky also testified that shortly before August 15, 1990, his

wife threw out a box containing all of his daily notebooks. He stated that she threw out the box so it would not remind him of his job; she did not realize the importance of these books. *Assuming that this explanation was true, it is difficult to justify Michalowsky's retention and control (at his home) of these notebooks, months after he was no longer on active duty. My later recommendations address this issue.*

The testimony of Sergeant Michalowsky was marked by a number of comments by the judge *in the presence of the jury*:

- When asked about his training with respect to identification work, the witness said that it took place at the Ontario Police College in Aylmer. The judge commented: "Sergeant Michalowsky, you are doing very well and we appreciate it, thank you."

- Michalowsky told defence counsel that he could not recall the number of homicides he worked on with Fitzpatrick and Shephard. Defence counsel then stated:

  > [Ms. Widner]: I would like to provide you - I don't think you have transcripts of some of your previous evidence, sir, so I want to give you and just ask you to keep these by you until I refer them to you, or you them.
  >
  > [The Court]: Sergeant Michalowsky?
  >
  > A. Sir?
  >
  > [The Court] No, no, sit down, sit down. I was just going to tell you that up in Goderich, where I come from, we say the tougher the job the better you feel when it's finished. I want you to keep that in mind if this becomes difficult for you.
  >
  > A. Thank you, your honour.

- When Michalowsky was asked if he knew an officer by the name of Holtorf, he replied:

  > A. I've heard of the name, madam. I don't know if I

know him personally or not.

[Ms. Widner]: Would it be appropriate to take a break, Your Honour? Do you need a break sir?

A. No ma'am.

[The Court]: Thank you Ms. Widner. Doctor? Doctor, do you regard it as appropriate to continue?

[Dr. Rowsell]: Yes.

[The Court]: Sergeant Michalowsky, you have shown great strength of purpose and recuperative powers in being able to come back from your emotional moments and we realize that's difficult for you, and certainly if you have a feeling that you would like more than a momentary break we want you to let us know, but I have the impression that given a short break you are able to reorganize yourself and get going again.

A. Yes, sir.

[The Court]: If I made a mistake in that assessment, I want you to try and help me out, please.

A. Thank you.

In the absence of the jury, Mr. Justice Donnelly expressed the following sentiments to Michalowsky during his evidence:

- When Officer Michalowsky first entered the witness stand, His Honour said:

  [The Court]: Sergeant Michalowsky, it's nice to see you again.

  [Michalowsky]: Thank you, my Lord.

  [The Court]: And I want you to understand, we want to make this as comfortable as we can for you. If you are in stress or difficulty, I want you to let me know. All right? You can sit here by the Doctor. He's in charge. Okay?

- Following a day's evidence, Sergeant Michalowsky

left the courtroom. In discussing Michalowsky's condition with his doctor (he had reported that he experienced chest pain) in the absence of the jury, Mr. Morin watched as the following exchange took place:

> [Dr. Rowsell]: He had a little [chest tightness] this morning, but that subsided fairly quickly. We were giving him a little valium, just half a tablet, from time to time and that seems to settle them [sic] him down a bit, but it's the emotional impact that's the real risk.
>
> [The Court]: Well, you can tell him this, that from my assessment of him he's conducting himself with dignity and courage and it's a matter he should be proud of himself and we'll go on from there.

Findings

With great respect, I am compelled to say that the trial judge's actions, while well-intentioned, were unfortunate. The conditions put on the defence made it extremely difficult to examine the witness effectively, and this all the more so since the defence was obliged to call Sergeant Michalowsky. The advantages of cross-examination were, therefore, lost and what even under normal circumstances would have been a delicate and difficult task was greatly aggravated by the special arrangements made to accommodate the witness.

As I said before, I do not question the fact that Sergeant Michalowsky was ill, and I can understand why Mr. Justice Donnelly felt obliged to take special precautions (regardless of whether the ones he took were or were not necessary). Indeed, as discussed below, I determined during the Inquiry, that, in light of the medical evidence, I would not direct that a summons be delivered to Mr. Michalowsky. But, as the trial judge quite correctly concluded, this was a murder trial and the defence considered Michalowsky's evidence essential; it would not have been right, barring very grave facts, to deprive the defence of this witness.

While it was the judge's desire to make the witness feel as much at ease as possible, such an accommodation must have limits, for otherwise the jury may get the wrong impression. I do not think that comments by the judge such as "you are doing very well and we appreciate it" or "you've shown

great strength of purpose and recuperative powers" were helpful. To the jury, this may have seemed like a judicial stamp of approval of Michalowsky's testimony; it may also have conveyed the impression that, for some unfathomable reason, the defence forced this poor man to testify, unmindful of the potential consequences. Either way, the results were unfortunate. If the trial judge insisted on proceeding in this way, I would have expected that, in the absence of Michalowsky, he would have advised the jury, in the strongest possible terms, that these accommodations, including his personal interventions, should not be taken as an endorsement of Michalowsky's testimony or honesty or even the genuineness of his purported inability to answer questions.

There is another aspect to this. Even though the jury was absent at times, Mr. Morin was not. He therefore saw the judge's action — shaking hands with the witness — and heard all of the judge's comments. This, after all, was the person charged with crimes arising out of Mr. Morin's own case. I do not for a moment believe that it ever crossed the judge's mind that these incidents may have given rise to fear by Mr. Morin that he was partial to the witness, but appearances are important, and certainly what happened in the courtroom cannot have inspired Mr. Morin with confidence.

Inquiry Ruling on Mr. Michalowsky's Appearance as a Witness Before This Commission

As I indicated, in the normal course of events, Commission counsel would have called Michael Michalowsky to testify in Phase IV of the Inquiry. However, it was submitted at the time by Mr. Michalowsky's counsel that his client was too ill to be called.

Sergeant Michalowsky's medical records (and prior medical assessments) were made available by his counsel, but I considered his potential testimony to be of sufficient importance to have an independent expert examine him and provide the Commission with an assessment of his capability to appear as a witness. I therefore appointed Dr. Allan Gordon Adelman, an Associate Professor of Medicine at the University of Toronto and a former Director of the Cardiovascular Clinical Research Laboratory at Mount Sinai Hospital, to examine Sergeant Michalowsky and report his findings to the Commission.

This examination was done on July 28, 1997, and a detailed report

was provided to me a few weeks later. The key findings were that "Mr. Michalowsky suffers from angina due to myocardial ischemia" and that neither

> his treating cardiologist [n]or myself can be certain whether or not Mr. Michalowsky would suffer an acute myocardial ischemia event while testifying. There is evidence that is likely because he is a very anxious man who is quite depressed and who has myocardial ischemia with very little provocation.

On October 28, 1997, I delivered reasons stating, in essence, that, in light of the medical evidence, "I will exercise my discretion and not issue a subpoena compelling Mr. Michalowsky to appear and testify." In my reasons I said:

> [I]n my view this is not a risk we can impose. I realize that Brian Gover, a former Crown attorney who testified at these hearings, was of the view that Mr. Michalowsky was "faking" when he testified with what appeared to be great difficulty at the trial. And Ms. McLean [Mr. Morin's counsel before this Commission] relied upon this evidence, together with the chronology of events, including the timing of Mr. Michalowsky's assertions of illness, in her submissions that he should be compelled to testify.
>
> However, the fact remains that there is incontrovertible evidence that Mr. Michalowsky has coronary artery disease, and while Doctor Adelman suggests that coronary and left ventricular angiography, followed by angioplasty, may well "improve his functional capability and allow him to testify before the Inquiry", this is not something that I can order.
>
> In fact, in fairness to Mr. Michalowsky I add at this point that we were informed that he has made arrangements to have the first part of this procedure carried out at St. Michael's Hospital in Toronto, and the likely date is towards the end of November.
>
> Only then can his physicians decide whether or not to proceed to the second part, the angioplasty, but I must note here that this procedure was attempted once before, but failed to succeed.

These reasons are set out in full in Appendix O, and I will not go into greater detail at this point.

Findings

Sergeant Michalowsky's evidence at the first trial was that a member of the search team, whose name he did not record, found a cigarette butt in the vicinity of the body. He produced it in evidence and described it as a recently dropped butt. Two photographs were introduced of a 'cigarette butt' at the first trial. Michalowsky testified that these were photographs of the same object taken at a different time. The second photograph was said to depict the same cigarette butt after the grass had been pulled back. During the first trial, Michalowsky was permitted to refresh his memory through use of a notebook. His testimony left the impression that the notebook entries were made contemporaneously.

I find that the cigarette butt introduced into evidence by Michalowsky was not the butt found at the body site. I find that the photographs did not depict the same object and were not taken in the sequence described by Michalowsky. I find that the notebook used by Michalowsky to refresh his memory during the first trial was not made contemporaneously with the events described therein or shortly thereafter. Further, some of the events described in that notebook did not take place. The conversation with Cameron, as described in that notebook, did not take place. The finding of a milk carton by Kapuscinski, described in that notebook, did not take place.

The cigarette butt may have had absolutely nothing to do with the identity of the perpetrator. Its treatment reflects on the quality of the investigation.

No reliance can be placed on any contested evidence given by Michalowsky at the stay motion or at either trial. I do not rely on his prior evidence to make any findings of fact where his evidence conflicts with the testimony given at this Inquiry.

(xiv) Continuity and the Evidence of Officer Robinet

Officer Robinet attended at the body site at 4:32 p.m. on December 31, 1984. He testified that the area was roped off when he arrived, and that

Christine's remains had already been placed on a wooden board, located directly south of the identification van. This is in conflict with a reference in Sergeant Michalowsky's second notebook which states that Officer Robinet assisted Michalowsky in roping off the area.

Officer Robinet has no recollection of taking any photographs that day. This, again, is in contrast to a reference in Michalowsky's notebook which reflected that both he and Robinet took photographs of the area.

Officer Robinet did not recall being at the scene when a cigarette butt or butts were found. This is in sharp contrast to Sergeant Michalowsky's testimony at the second trial where he stated that Officer Robinet got very upset when he learned that Sergeant Cameron had thrown a butt on the ground at the body site. Nor did Robinet agree with Michalowsky that, following this incident, he placed a plastic bag on the identification van and told all officers to put their garbage in the bag. He did, however, recall that there was a garbage bag hanging from the identification van mirror when he got there. Robinet stated that he could not recall anyone smoking in the environment surrounding the remains.

Officer Robinet testified that Tom Cameron was at the scene when he arrived at 4:32. In fact, Officer Cameron did not arrive until 4:58 that afternoon.

Officer Robinet did not testify during the first trial of Mr. Morin as Sergeant Michalowsky covered all identification issues in his evidence. But at the second trial Robinet was tendered as a witness to establish continuity of the Crown's exhibits.

Officer Robinet's evidence at the stay motion in June 1990 was that, apart from assisting Sergeant Michalowsky in carrying the exhibits into the station, he had no recollection of the way in which he helped Sergeant Michalowsky and no recollection of any specific exhibits that were there or what was hung up to dry.

This is in contrast to his evidence at the second trial on January 21, 1992, where he testified that he assisted Sergeant Michalowsky in taking specific items out of the identification van and into the identification laboratory. He helped Michalowsky in tearing off and placing brown kraft paper under the area in which Christine Jessop's clothing was hung to dry. He

recalled a pair of blue corduroy pants and two off-white running shoes with blue trim. He also provided testimony in relation to Christine Jessop's recorder and bag. But his rough notes, notebook and supplementary reports do not reflect the specifics provided in his evidence.

Proof of the continuity of Christine Jessop's pants, running shoes, recorder and recorder bag were of critical importance to the prosecution's case, since fibres found on these items were purportedly linked, as we have seen, to the Morin Honda. Robinet's evidence, enhanced as it was at the second trial, assisted in establishing continuity.

At the Inquiry, Officer Robinet, when questioned about the considerable improvement in his recollection, testified that it was brought about by his review of photographs which had been taken, by a perusal of certain transcripts of the evidence, and by his pre-trial preparation with Mr. Smith, one of the Crown attorneys. Constable Robinet's notes record 20 hours of pre-trial preparation with Mr. Smith, spread over several days. He added that he had not seen some of the photographs before, so when he testified a few days later they were fresh in his mind.

On November 22, 1992 Constable Robinet attended the courtroom with Mr. Smith, Sergeant Smith and the registrar to view the clothing exhibits. Mr. Smith did not specifically recall this exercise, but testified that his practice is to give witnesses an opportunity to view exhibits before being called to testify.

Despite the time spent with Robinet, Mr. Smith denied suggestions put to him that he had 'spoon-fed' the evidence to the witness. He also denied that Robinet's testimony was required in order to minimize the damage caused by Sergeant Michalowsky. All the Crown needed, he said, was to show that the exhibits tested were, in fact, the items which had been taken to the station.

Findings

Memories are not frozen in time and additional details can be recalled sometime after events have occurred. As I have reflected earlier, details may acquire heightened significance due to the issues raised by defence counsel. I have made generous allowance for this phenomenon. Having said that, Officer Robinet demonstrated considerable, if not remarkable, improvement

in his recollection respecting his involvement in the items collected at the body site. Indeed, if Robinet's memory of these events had been as thin at the second trial as it had been when he gave evidence in June 1990, the Crown may have had some difficulty in establishing the necessary continuity. (I am not prepared to say that Robinet's improved memory was absolutely necessary to prove continuity.) Yet again, the absence of contemporaneous records supporting Constable Robinet's improved memories invites concern that details are being later supplied to buttress the Crown's position. I do not find that Constable Robinet's evidence was knowingly false. I specifically find that Alex Smith did not deliberately counsel perjured evidence or deliberately 'feed' Constable Robinet with details, not known to Robinet, so that Robinet would adopt them as his own. I am aware of the very substantial amount of time that Smith spent with Robinet in preparation for his evidence. Smith's failing may have been that he did not take adequate care to ensure that his interviewing did not contaminate Robinet's testimony. I understand that it is appropriate to review documentation with a witness in preparation for trial. Counsel should be alert to the dangers in doing so, where the witness' own contemporaneous records and his or her prior testimony compel a cautious approach in the interviewing process. Despite the absence of any finding of deliberateness, I am left with the concern that Robinet's ultimate testimony no longer reflected an accurate recollection of his involvement in the events of October 3, 1984.

(xv) Conclusion

In this case, it is truly remarkable the extent to which the memories of a number of Crown witnesses improved as the proceedings progressed.[7] Some of this, as I have said, was expected and was responsive to the more detailed demands placed upon them in the later proceedings. I find that some of this was a product of an interviewing process (such as collective meetings or overly informative questioning of witnesses) that was not designed to create unreliable evidence, but which nonetheless had that very effect. I find that a number of witnesses adopted and incorporated into their evidence things they were told by others — often, done subconsciously; sometimes, I regret to say, done deliberately.

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[7] The extent to which the memories of defence witnesses also improved is discussed later in this Report under Alibi.

Throughout my analysis of the body site evidence, I have assessed the Crown's responsibility for evidence which may be unreliable. My conclusion throughout is the same. I do not find that any Crown counsel counselled perjury or deliberately contaminated the evidence of witnesses. However, I do find that prosecutors failed to take appropriate measures to preserve the integrity of the interviewing process. I accept that, in the context of the 'lighter' evidence (and some other aspects of the body site evidence), the Crown attorneys did not regard this evidence as anything more than a 'red herring,' which undoubtedly affected the way in which they related to the officers on these issues. As well, they were affected by the fact that these were police officers. Collective meetings with police officers about substantive matters are as problematic as the assembly of civilian witnesses to discuss their collective evidence — and Crown counsel did not seem to fully appreciate this at the time.

Some time was spent in the course of the Inquiry examining the usefulness — indeed, the propriety — of collective meetings of this nature generally. Certainly, a great deal of time can be saved by having everyone in the room at one time in the hope that a complete (and accurate) picture will emerge. On the other hand, the dangers inherent in this procedure are clear: memories are jogged, lacunae are filled in and, in the end, recollections may be adjusted to fit in with the general pattern. I do not suggest that this is necessarily done in bad faith, but that does not alter the fact that independent recollection may be sacrificed on the altar of collective recall, and important details (and differences) may be lost in the process.

This poses a dilemma. On the one hand, a Crown attorney, preparing for trial, will want all the facts. And he or she will want them in one coherent story from beginning to end. So why not get all the participants in one room and proceed in chronological order? On the other hand, when it comes to preparing a witness for trial, counsel should not be suggestive, and it is clearly undesirable to try and dovetail the evidence of a number of witnesses to make a perfect whole. And what does one do with conflicting recollections from one's anticipated witnesses? Counsel may understandably wish, in fairness to the witness and with a view to ascertaining the true facts, to advise witnesses of conflicting evidence to invite comment and reflection. On the other hand, the dangers are obvious. The line is a thin one. Great caution must be exercised by counsel.

Recognizing this 'thin line,' certain guidelines seem appropriate:

- Counsel should generally not discuss evidence with witnesses collectively.

- A witness' memory should be exhausted, through questioning and through, for example, the use of the witness' own statements or notes, before any reference is made (if at all) to conflicting evidence.

- The witness' recollection should be recorded by counsel in writing. It is sometimes advisable that the interview be conducted in the presence of an officer or other person, depending on the circumstances.

- Questioning of the witness should be non-suggestive.

- Counsel *may* then choose to alert the witness to conflicting evidence and invite comment.

- In doing so, counsel should be mindful of the dangers associated with this practice.

- It is wise to advise the witness that it is his or her own evidence that is desired, that the witness is not simply to adopt the conflicting evidence in preference to the witness' own honest and independent recollection and that he or she is, of course, free to reject the other evidence. This is no less true if several other witnesses have given conflicting evidence.

- Under no circumstances should counsel tell the witness that he or she is wrong.

- Where the witness changes his or her anticipated evidence, the new evidence should be recorded in writing.

- Where a witness is patently impressionable or highly suggestible, counsel may be well advised not to put conflicting evidence to the witness, in the exercise of discretion.

- Facts which are obviously uncontested or incontestable may be approached in another way. This accords with common sense.

These guidelines enhance the reliability of the interviewing process and ensure that not only the ultimate evidence of the witness is disclosed, but also the basis for the changed recollection. This is an approach that is presently employed by many counsel, without any formalized process, as a matter of practice. I am certain that Crown counsel, not infrequently, advise the defence that a witness is now saying one thing, but originally told the Crown something else and that the change came about in a certain way.

In conclusion, I again note that a number of the items found at the crime scene may not have been connected in any way to the identity of the killer. But that is not the point: they were gathered at the scene, they were bagged and tagged. Surely, both the Crown and the defence were entitled to be told with certainty exactly where these items were found, who found them, and at what time. No such certainty was ever established, and I can understand John Scott's exasperation when told that a potential exhibit was lost. I can equally understand Jack Pinkofsky's frustration (and scepticism) at getting different answers from different people about the same thing.

The body site evidence was therefore disturbing for two reasons. First, it reflected upon the quality of the search at the scene. Second, and more importantly here, it reflected upon the quality of the testimony given by officers in the case generally. My later recommendations address both issues.

C. The General Investigation

(i) Jurisdiction

Traditional protocol in Ontario dictates that in situations where an abduction occurs in one jurisdiction and the body is found in another, the police force governing the area in which the remains are discovered has jurisdiction over the homicide investigation. By December 31, 1984, when Christine Jessop's remains were discovered, the York Regional Police force had investigated the child's disappearance for approximately three months.

Once the body was found in Durham Region, the Durham Regional Police Service automatically assumed jurisdiction for the investigation.

Should consideration be given to enable the original investigating police force to continue with the investigation when an abduction takes place in one jurisdiction and the murder victim is found in an adjacent jurisdiction? Inspector Robert Brown of Durham was of the view that since the York Regional Police had investigated this disappearance for three months and had maintained all files, it should have continued the homicide investigation:

> To me it makes no sense to bring an entirely different group of people and have to go through and redo an entire three months of work by another service, and which we had to do. We couldn't rely on, nor would we expect anyone else to rely on what we would have done over a three month period.

On the other hand, in certain circumstances, there may be some benefit to a fresh perspective and a review of an investigation that has stalled or where the trail has grown cold. But these occasions would seem to be the exception. I stress, however, that Inspector Brown's opinion, which I share, is based on the assumption that the two jurisdictions are *adjacent* or, at least, not too far apart.

(ii) The Transfer of Files

Upon assuming carriage of the homicide investigation, Durham made a request for all supplementary reports concerning the missing persons investigation from York Region. As described in Chapter IV, York Regional Police used an alpha-numeric indexing system, while Durham used both an index system and a companion computerized system of indexing which facilitated the retrieval of reports that contained a certain word, licence number, or name. One could access vehicle models and colours through the computer, which would then refer the investigator to the supplementary report relating to that request.

Detective Bernie Fitzpatrick testified that York's index of its supplementary reports was of no assistance to him and his colleagues. Accordingly, Durham chose to re-index and incorporate all of York's supplementary reports into its file. This took from two to three weeks.

Inspector John Shephard was directed by Inspector Brown to read the two binders of York Regional reports the first day he was assigned to the case. Inspector Shephard testified at the pre-trial motion before Mr. Morin's second trial that he probably spent 'a couple of hours' reviewing the York supplementary reports, but did not find them helpful:

> There was no system to them, no flow of the information. That material was of very little assistance because I didn't find a lot of reports complete or thorough. I just didn't put much faith in the reports at all ... very seldom did I resort to the York reports in the course of the investigation ... prior to the preliminary inquiry, I may have gone into the York files to review a report, but I had not sat down and reviewed all their reports.

Inspector Shephard told the Inquiry that the chronological organization of the reports created difficulties in terms of continuity with respect to various aspects of the investigation. He said that the York file was never adequately reviewed, nor was the complete file ever received from the York Regional Police force. Nevertheless, he would not characterize the relationship between the forces as poor. Similarly, Detective Fitzpatrick testified that he did not review the York notes and accessed the York supplementary reports 'very little.' While in hindsight he agreed it probably would have been a good idea to have spent more time reviewing these reports, he did not see it as his responsibility, even as one of the lead investigators, to make himself familiar with them. While he recalled reading the original occurrence report, Detective Fitzpatrick assumed that Inspector Brown would have reviewed all of the reports and, if there was anything of interest or import, would have alerted the investigating officers. He could not specifically recall, however, any occasion when such information was passed on.

In contrast to the testimony of Shephard and Fitzpatrick, Inspector Brown had a different recollection:

> Q. To what extent were York's reports read by the Officers under you who were investigating this homicide?
>
> A. I understand that they were all read.

Inspector Brown said that he was "quite sure that [he] would have read the reports himself," but he was unable to provide the Commission with any idea as to how many reports he had actually examined. He said that the officer who was responsible for indexing the York supplementary reports would have read every report and indexed it. But Constable Patrick Holtorf, who was given this task, testified that he did not do so by actually reviewing the York reports, but rather by utilizing York's index book. When asked specifically whether the chief investigating officers ought to have read all of the York reports, Inspector Brown would only say "possibly."

Both Inspector Brown of Durham and Inspector Robert Wilson of York commented that the liaison between the York and Durham forces was characterized by full and total cooperation. But a telephone log kept by Durham Police summarizing a taped conversation that Janet Jessop had on March 6, 1985 with her husband, contained the following information:

> Talk about Durham being there and how she couldn't tell Durham anything about what York's doing. Durham's not telling York what's done, and are doubting what York has done. They were up questioning times and so on.

While this note seems to imply that there was some friction between the two forces, Inspector Brown insisted that this was not so.

Findings

By and large, the transfer of this investigation from York Region to Durham was unproblematic. Durham was apparently satisfied that York Regional Police turned their entire file over to Durham and assisted in the transition. Inspector Brown described the liaison between the two forces as excellent, "It was absolute, full, total cooperation." In my view, one problem which was identified here was that the supplementary reports by York Regional officers could have been improved at times. Having said that, the Durham investigators were too easily dismissive of them — they contained important information.

(iii) The Initial Homicide Investigation

Following the discovery of the remains, two teams of detectives were

assigned to this investigation, working independently of each other: Detective Fitzpatrick and Inspector Shephard, and Detectives Joseph Loughlin and Reg Webster. There was some element of competition inherent in the structure of the investigation; the team which developed the 'best' suspect would take ultimate control of the investigation. Inspector Brown delegated various tasks to individual officers and received the reports from all officers involved in the investigation. He told the Inquiry that every morning there was an informal meeting of all officers who were present to discuss the investigation in general and the events of that day in particular. As the investigation continued, meetings became less frequent and were scheduled for Friday afternoons. It was Inspector Brown's opinion that while there may have been some minor issues of which some teams were unaware, he was confident that all major facts were disseminated to all of the investigators.

Other officers who testified did not recollect the morning meetings, but recalled the informal Friday afternoon sessions. Detective Fitzpatrick said that there was no rule requiring attendance at these meetings. If he was busy elsewhere, he would not go. According to his recollection, discussion in these meetings involved the status of the outstanding work assigned. He did not recall ever discussing the nature of the investigation with everyone. While there were occasions when Inspector Shephard and he met alone with Inspector Brown, he did not recall that the general Friday meetings involved discussions regarding the nature of work performed. Inspector Shephard agreed that Inspector Brown was emphatic about knowing the progress of the investigation.

Detective Fitzpatrick said that he did the work assigned and never read other officers' reports; nor was he kept apprised of what others were doing in the course of the investigation. In hindsight, he agreed that "the left hand might not know what the right hand was doing in this investigation." Inspector Brown disagreed with that comment. Inspector Shephard stated that he did not try to keep on top of what other investigators were doing as he assumed Inspector Brown was reviewing the incoming reports and assigning any follow-up necessary. In fact, he said, even "Fitzpatrick and I did not always genuinely know what each other was doing." And yet they were partners. However, Inspector Shephard said generally the two partners would report back to each other on investigative work conducted independently, and that they would generally review supplementary reports prepared by the other involving work performed as a team.

By mid-February 1985, each team had developed a number of suspects. Detectives Loughlin and Webster investigated three primary suspects. Shortly after Detective Fitzpatrick and Inspector Shephard interviewed Mr. Morin on February 22, 1985, they became the lead investigators in the case. According to Detective Fitzpatrick, he and Inspector Shephard were so designated because they had developed Mr. Morin as a suspect "to a certain degree of viability." Had members of another investigative team developed a suspect to the same degree of viability, they may well have become the principal investigators. But, according to Fitzpatrick, there was no competition amongst teams. After his and Shephard's designation as lead investigators, Loughlin and Webster left the case without, however, turning over the fruits of their investigation into other suspects. In hindsight, Inspector Shephard agreed that this should have been done.

(iv) The Use of Polygraphs

Both Detective Fitzpatrick and Inspector Shephard said that they relied, to some degree, on polygraph testing as an investigative tool; for example, where a suspect could not establish an alibi. However, according to Fitzpatrick, suspects were not cleared solely on the basis that they had passed a polygraph test. He agreed that to do so would be improper. Fitzpatrick's opinion was that the primary value of the polygraph lay in the pre-test interview during which evidence could be elicited.

Examples were provided during this Inquiry of suspects who, at first blush, appeared to be cleared prematurely. In the case of Mr. W., a suspect interviewed in January 1985, Detective Fitzpatrick wrote a supplementary report which stated "Further investigation ... to be conducted if he fails the polygraph test."

In reference to this supplementary report, Fitzpatrick was asked:

> Q. [You] were prepared to let [him] go if he passed the polygraph test?
>
> A. No, ... there would have been further investigation done.
>
> Q. All right. It says that if he failed the test, you'd do further investigation. The other side of that coin would

> be if he passed the test, [there would] be no further investigation, or do I read it incorrectly?
>
> A. No, you're right the way you're reading it, that's what it says there.

Both Fitzpatrick and Shephard testified that Mr. W, who did not take the polygraph test on advice from his lawyer, was cleared on the basis of further investigation.

On January 14, 1985, Detective Fitzpatrick filed a supplementary report reflecting that another suspect, Mr. M,

> attended at 18 Division where he took a polygraph test. He denied any involvement in the incident and the polygraph test showed he was telling the truth.
>
> This person can be ruled out as a suspect at this time.

During the Inquiry, Fitzpatrick contended that prior to the polygraph test, other investigative steps had been taken in relation to Mr. M. which led to his elimination as a suspect.

One final example concerned a suspect referred to as Mr. A. Durham officers had obtained a warrant to search the premises of Mr. A. They obtained this search warrant by demonstrating their belief, on reasonable grounds, that Mr. A was guilty of the murder and that evidence of the crime would be found at his premises. This search warrant was not executed once Mr. A passed a polygraph test. Detective Van Dyke said that he told the investigating officers to go ahead and obtain the search warrant (which he did not realize had already been obtained) and was surprised to learn that the search was not effected. During the Inquiry, he was asked why:

> A: ... I sure felt he was a very strong suspect, and told them that: Don't base your full decision on this. There are other factors, and he could very well be one of those people that could sneak through polygraph tests, and you should still go ahead and do the search warrant, if that's what you decide to do.
>
> Q: And I take it that reflects your view, and I appreciate your candour that even as a polygraph examiner, that they are to be used as an investigative

> tool only, but not as a replacement for a full and complete investigation of potential suspects?
>
> A: That's correct.

Mr. Gover expressed his view at the Inquiry: "I think clearly the investigators came to the view that the other suspects were cleared simply on the basis of their growing feeling that Mr. Morin was the perpetrator of these acts."

Findings

On the totality of the evidence, I am satisfied that the investigators placed undue reliance, at times, upon the polygraph as a quick and ready means of clearing suspects. The polygraph is but another investigative tool which is no substitute for a proper investigation. My later recommendations address this issue.

(v) Record-Keeping: Note taking and Supplementary Reports

It is crucial in a homicide case to manage paperwork effectively. This includes the proper documentation of observations, interviews and other matters pertaining to the investigation in notebooks and/or supplementary reports. A notebook is a daily journal in which relevant occurrences in a police officer's investigation are recorded. Maintaining proper note taking is essential. It is an *aide-mémoire* for the officer who may later testify as to his or her observations. To serve in this capacity, notes should be made contemporaneous to the event. It is imperative that the officer's notebooks be retained, in the very least, until the criminal cases to which the notebooks refer are ultimately determined. My later recommendations address this issue.

Unfortunately, in this case notebooks were not always available; for example, in 1987, when Inspector Brown was transferred to a uniformed command, he packed up his belongings from his office, put his notebooks in a cardboard box and took everything home. During one spring cleaning, he put all of his old notebooks in a green garbage bag and took them out with the trash. At this time, Mr. Morin's charges were, of course, still outstanding before the courts. Some officers, during the Inquiry, who did not have their notebooks to assist them in their recollection, said that the regulations of their force required that notebooks be tendered to the property unit three years for

disposal. Again, my later recommendations address this issue.

Officers recorded in writing the details of their daily investigation in four different ways:

- rough notes on a separate foolscap pad;
- the police- issued notebook;
- for major occurrences, some officers would keep a separate notebook related only to that particular investigation;
- an occurrence report (when incident was first reported) or supplementary report (filed in the course of the ensuing investigation).

Inspector Shephard and Detective Fitzpatrick sometimes took notes on foolscap and the same day transferred them to their notebooks or supplementary reports. The foolscap was often discarded. Inspector Brown said that any officers engaged in this practice should have kept the original notations for trial purposes. Both the dentist, Dr. Paul Taylor, and his assistant, Lorraine Lowson, recalled that Fitzpatrick and Shephard on many occasions interviewed them and appeared to write complete notes of their conversation while they were speaking. But no detailed notes could be found in their notebooks, nor were foolscap pages kept reflecting the interviews with these witnesses.

Another example of an interview where only a brief notebook entry documented a lengthy interview was that of Ken and Janet Jessop on March 6, 1985. This interview, which will be discussed in detail below, related to the issue of the time of their arrival home on October 3, 1984. Detective Fitzpatrick said that he and his partner spoke to the Jessop family frequently, but for many occasions there is no record of what was discussed.

In the course of the Inquiry it was suggested to Inspector Shephard that the record of investigative work carried out in the case was less than adequate. He responded that while it was not perfect, an adequate record was, indeed, documented in the supplementary reports.

Findings

The evidence revealed numerous instances where interviews, sometimes lengthy, were held with witnesses, whose evidence was ultimately highly contentious and respecting whom it was alleged that their evidence had been 'developed' through the interviewing process. A number of times, there would be a wholly inadequate written record of those interviews. Hours of untaped interviews might be reflected in a single entry in a notebook or in an incomplete *précis* or description of the interview contained in a supplementary report. When dealing with the body site evidence, I reviewed a number of instances where officers' notes of their actions at the crime scene were inadequate.

Inadequate records not only hindered the ability of officers to recollect the substance of their interviews or activities, they seriously affected the ability of any trier of fact to assess whether the interview process was done in a way to enhance or detract from the reliability and/or accuracy of the witness' account. Where records do not disclose potentially inculpatory aspects of a witness' later testimony, legitimate concerns are raised as to whether the testimony represents an honest and accurate recollection or, instead, testimony coloured by later events (such as the identification of a suspect or criminal defendant) or worse. A serious commitment to proper records therefore protects the officer and assists the Crown attorneys, the defence and the triers of fact, and makes it more difficult to consciously or subconsciously provide unreliable evidence.

One answer, discussed throughout this Report, is the videotaping or audiotaping of certain events or interviews. The interviews conducted by Durham officers of Mr. May and Mr. X, the tape-recorded interview of Paddy Hester by Officer Fitzpatrick (later discussed) and the tape-recorded interview of Frank Devine by the two investigators provide examples of the value of tape-recording. A tape-recorded interview illuminates the way in which the interviewing process enhanced or detracted from the reliability and accuracy of the evidence. It helps identify the reasons that a witness changes testimony. It reveals bias, both on the part of the witness and the interviewer, where bias exists. It protects the officer against allegations which are groundless, or if substantiates such allegations. It inhibits impropriety on the part of the authorities.

The Nature of Recorded Interviews

One issue raised at this Inquiry was whether interviews by Fitzpatrick and Shephard were selectively recorded. This issue was explored by Commission counsel with Officer Shephard.

Between February 27, 1985 and April 15, 1985 Detective Fitzpatrick and Inspector Shephard tape-recorded 19 interviews with witnesses including members of the band to which Mr. Morin belonged, his neighbours, and members of his family. During the same period of time witnesses were interviewed on the issue of timing. The evidence of each of these latter witnesses[8], none of whom had been tape-recorded, was relied upon by the prosecution at trial.[9] Following Mr. Morin's arrest, many other witness interviews were tape-recorded. With the exception of two individuals[10], witnesses who ultimately testified for the Crown at the second trial, whose evidence was alleged by the defence to be unreliable,[11] were not tape-recorded. Inspector Shephard's evidence on this issue is set out below.

> Q. All right, now just stopping there for a moment, and all of those witnesses we've heard were witnesses relied upon by the prosecution, and whose credibility was relied upon by the prosecution. Ms. Pike, Doctor Taylor, Janet Jessop, Ken Jessop called by the defence, and then Mr. McGuigan eliciting from him evidence that was later used to support the position of the Crown at the second trial. None of them were tape recorded by you or Officer Fitzpatrick in their conversations with you prior to Guy Paul Morin's arrest; right?
>
> A. I don't recall them being taped, but if you've gone through my notebook, were there are other tape recordings done on the days that we interviewed those people?

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[8] Dr. Taylor, Lorraine Lowson, Janet Jessop and Ken Jessop.

[9] Ken Jessop was called by the defence. In cross-examination evidence was elicited in support of the case for the prosecution.

[10] Douglas Greenwood and Paddy Hester.

[11] Leslie Chipman, Mandy Patterson, Ted Carruthers, Constables McGowan and Robertson.

Q. Well, I'm about to ask you, can you explain why it was that Doctor Taylor, Ms. Pike, Janet Jessop and Ken Jessop were not tape recorded when they described certain events having to do with timing prior to Guy Paul Morin's arrest?

A. No, sir, I can't, other than possibly we didn't have the tape recorder on that day. That's the only thing that I can think of.

Q. Well, in the very least, you had a tape recorder on February the 27th, 28th, March 7th, 14th, 19th, 20th, 28th, 29th, April 1st, April 2nd, April 4th, April 5th. You're not suggesting that you couldn't have access to a tape recorder if you wanted to conduct an important interview during that period of time?

A. Well, I'm sure we could have got a tape recorder somewhere, but whether we could have actually got that particular tape recorder that we were using in the brief case, there were other people using it. So I don't know whether we had it on those dates or not. I'm sure that if we wanted a tape recorder, we could have obtained a tape recorder.

Q. Of course. I guess what I want to ask you is, can you see any rhyme or reason to why all of those witnesses prior to April 22nd of 1985 were tape recorded, but that Doctor Taylor, Ms. Pike, Janet and Ken Jessop were not tape recorded?

A. No, sir, I can't.

Another issue at trial involved the surreptitious nature of the tapings. Mr. Shephard was asked about this during the Inquiry:

Q. Well, let's move on a little bit. After Guy Paul Morin was arrested, we also see that many people had conversations with you and Officer Fitzpatrick, and their conversations with you were also tape recorded. And you recall that many other people were tape recorded; am I right?

A. Yes, sir.

Q. During the reinvestigation stage; okay?

A. Yes, sir.

Q. And by the way, did any of these people, either pre or post Guy Paul Morin's arrest, know that they were being tape recorded?

A. No, sir, I don't believe so.

Q. Why? Why the surreptitious recording of the conversations?

A. Well, a lot of people have a tendency, if they see that you're — they're being tape recorded, they're evasive, and we wanted to get a true reflection of what they had to tell us.

Q. So that is it your evidence that people like the band leaders, and the lady who helped you secure hair samples from Guy Paul Morin, and the neighbours, and Mr. Polgar might be evasive if they knew that their interviews were being tape recorded?

A. Yes, they may have been.

Q. All right. Well, you tape recorded in the period after Guy Paul Morin's arrest Richard Mortimer at the Ontario Research Centre, Stephanie Nyznyk and Mr. Pratt, Doctor Blake, RCMP officer John Bower, and many others; many others. Did they know that their conversations with you were being tape recorded?

A. A lot of those were telephone conversations I had — or some of them were, anyway — and no, they didn't know they were being taped.

Q. Well, why surreptitiously tape record Stephanie Nyznyk, RCMP officer John Bower, Doctor Blake? The list goes on and on and on. I mean, were you concerned about these people being evasive?

A. No, I wasn't concerned about them being evasive, I just didn't tell them they were being taped. And the reason I taped them was for accuracy so that when I was compiling reports, that I didn't misinterpret what they were saying, misconstrue their conversation. I wanted an accurate reflection.

Due to the surreptitious nature of the recording, Shephard could not recall checking the equipment during any witness interview.

> I mean, you had no idea whether the tape was running, you just flip the switch, or push the button, or whatever it was, and it was up to the grace of God and the mechanics and the machine and the button whether it worked or not.

On those occasions when the recorder did malfunction, Fitzpatrick said that he did not conclude one way or another whether the machine was broken and in need of repair. The same tape recorder was used throughout the investigation.

To state the obvious, it would have been preferable had interviews with Dr. Taylor, Ms. Lowson, Janet and Ken Jessop, Leslie Chipman, Mandy Patterson, Ted Carruthers, and Constables McGowan and Robertson been tape-recorded. The ability of counsel and the jury to evaluate the extent to which the interviewing process enhanced or detracted from the reliability and accuracy of this evidence was greatly diminished. There was some selectivity in the interviews which were not tape-recorded; the officers were more inclined, though not invariably so, not to tape-record witnesses who potentially would give contentious evidence favouring the Crown. Tape-recording was more frequently done of less important, uncontentious witnesses or witnesses (such as Guy Paul Morin and Frank Devine) whose evidence might later be challenged by the authorities, through the use of the tape. Paddy Hester is a notable exception — except, as later reflected, her tape-recorded interview was never disclosed to the defence or to the Crown.

It also would have been preferable had tape-recording not been done surreptitiously. Indeed, as I understand it, this no longer represents police practice, nor should it.

Finally, it would have been preferable had greater care been taken to ensure that the tape-recorder was functioning throughout the important interviews. It has been suggested that the tape-recorder never truly malfunctioned, particularly during interviews conducted with Guy Paul Morin. I do not agree. This reflected sloppiness, not malevolence.

My later recommendations address the proper taking of notes, their retention and the use of videotaping and audio-taping.

(vi) Guy Paul Morin's Status as a Suspect

In February 1985, both teams of detectives continued their separate investigations into the murder of Christine Jessop in hopes of targeting her killer. Detective Fitzpatrick described how the teams reviewed police records of both his force and those of neighbouring jurisdictions, probation and parole records and the OPP Pornography Unit records of known sexual offenders. In all, they identified between 350 to 375 potential suspects during this stage of the investigation. Unfortunately, in 1985 there was no provincial or regional central database from which investigators could draw a list of offenders involved in offences of a similar nature. CPIC checks were conducted to determine whether suspects who had been pinpointed were in custody at the relevant time. If a suspect had a known workplace, inquiries were made to determine whether he was at work at the relevant time and, therefore, could not have been the abductor. Interviews were conducted, alibis were followed up and, if warranted, potential suspects were asked to take a polygraph test.

On February 14, 1985, Detective Fitzpatrick and Inspector Shephard met with Ken and Janet Jessop. During this interview, the Jessops mentioned that their next-door neighbour, Guy Paul Morin, was a 'weird-type guy' and a clarinet player. Inspector Shephard said that this information directed some suspicion towards Mr. Morin.

Fitzpatrick and Shephard testified that prior to February 22, 1985, when Mr. Morin was first interviewed, they did not consider him a suspect, but as a potential witness they wanted to interview because of his close proximity to the Jessops. Since the police theory was that Christine had been abducted in the immediately vicinity of her home, Detective Fitzpatrick said it was logical to speak to the neighbours. He added that a decision was made to interview him, along with other members of his family, because

> [t]hey hadn't gotten involved in the search for Christine, next-door neighbours. They were also described to us as being a different type of family, a weird family. I seem to recall I may have looked at some of the reports, York. They hadn't been properly interviewed ... There was an indication that even one of our own officers has attended across there and didn't get any information.

Fitzpatrick and Shephard further testified that, in the course of their discussion, Janet Jessop told the detectives that Guy Paul Morin's parents, particularly his father, were very possessive, overbearing and domineering. Accordingly, the two officers believed that it would be more productive to conduct the interview with Guy Paul away from his family. Arrangements were, therefore, made to place Mr. Morin under surveillance to enable Shephard and Fitzpatrick to stop him when he was alone, driving his car, in order to question him. On the evening of February 19, 1985, the officers unsuccessfully attempted to execute their plan.

A second unsuccessful attempt was made on February 21st to draw Mr. Morin away from his residence. This time a ruse was to be employed whereby someone at the Department of Transportation would telephone Mr. Morin to advise him that he must attend in Oshawa for a driver's licence interview. The plan was that Shephard and Fitzpatrick would then pull him over as he drove to the interview. The plan failed because Mr. Morin was not at home.

Despite Detective Fitzpatrick's and Inspector Shephard's position that Mr. Morin was viewed only as a potential witness and not as a suspect, Fitzpatrick's notebook entry for February 20, 1985, discloses the following wording in relation to Guy Paul Morin: "Info suspect Morin in Toronto," and "Suspect's vehicle KWX 305 in driveway."

Detective Fitzpatrick attributed the use of the word 'suspect' to police jargon commonly used to describe witnesses. He acknowledged, however, that his notebook entries relating to interviews with other neighbours of the Jessops did not utilize that term. But the word was used elsewhere in his notebook in relation to known sex offenders being investigated in connection with this case.

On February 21, 1985, Inspector Shephard's notebook records a meeting with Inspector Brown from 9:50 to 11:50 a.m. "Re Morin situation." Inspector Shephard was unable to provide any assistance as to what had been discussed at this two-hour meeting; he maintained that his communication relating to the Morin situation would have taken approximately five minutes.

Findings

I find that Fitzpatrick and Shephard did regard Guy Paul Morin as a suspect prior to their interview with him on February 22, 1985. The attempts to interview him alone go well beyond what one might expect for a prospective witness (whatever they were told about the Morins.) I refer in particular to the ruse involving the Department of Transportation. I find that the use of the word 'suspect' in Officer Fitzpatrick's notes did not simply reflect police jargon. This finding has importance because it bears upon the attitude with which the two officers approached Mr. Morin that day and which, quite subconsciously, had an impact on the inferences they drew from some of his remarks.

(vii) The February 22, 1985 Interview of Guy Paul Morin

On February 22, 1985, Inspector Shephard and Detective Fitzpatrick attempted to find Mr. Morin's sister, Yvette Devine, to interview her concerning a white car she had seen on the afternoon of October 3, 1984 in the Jessop driveway. As the detectives could not find her at her home she shared with her husband, Frank Devine, they drove to the Morin residence, unannounced, for the purpose of interviewing Guy Paul Morin. As they approached the rear door of the Morin home, Guy Paul came out of the house and agreed to speak with the officers in their parked car in the driveway.

In Inspector Shephard's will-say, first recorded after Mr. Morin's arrest, he observed: "It appeared to me at this time, almost as though he did not want us to reach the back door."

Inspector Shephard agreed that this statement carried a somewhat sinister connotation that, perhaps, Mr. Morin did not want the police to see something going on in the house. He conceded that at the time he prepared this will-say, his perception of an innocent event may have been coloured by the fact that Mr. Morin had been charged with first degree murder. *This provided a clear example of something which becomes a recurrent theme in this Report — an innocuous event, Morin leaving the house to greet the officers, was coloured by an officer's perceptions about him, to become sinister. I later find that the 'consciousness of guilt' evidence tendered at trial must be evaluated in the light of this psychological phenomenon.*

Detective Fitzpatrick and Inspector Shephard had pre-arranged to tape-record the interview of Guy Paul Morin, the first tape-recorded interview in the investigation. A cassette recorder was obtained from Durham's intelligence office in Whitby, where the two officers were based at the time. The recorder was placed in a briefcase for surreptitious recording. A 90-minute cassette tape was provided by intelligence. The interview lasted between 90 minutes and two hours. After 45 minutes the tape had to be manually turned over in order to make use of the 90-minute tape. As neither investigator realized that the tape had to be turned over, the first 45 minutes of the interview with Mr. Morin were recorded, but the next 45 minutes were not. Even had the tape been turned over, any conversation in excess of 90 minutes would not have been captured by the tape.

Because of their belief that their conversation was being fully taped, neither Shephard nor Fitzpatrick kept a complete simultaneous record of the interview in their notes. In fact, Detective Fitzpatrick took no notes at all. Shephard started the interview taking rough notes on various issues, but at one point he began to write a history on a separate document. These two sets of notes were filed as exhibits at Mr. Morin's second trial. Inspector Shephard said that both sets were written during the interview; the rough notes were in point-form in the third person, and the history was formatted as a 'witness statement.' These notes were incomplete, did not contain the context in which things were said, and some of the statements were out of sequence. Mr. Morin was not asked to review, sign or comment on either sets of notes that were made during this meeting.

The detectives' suspicions were aroused by a number of comments made by Mr. Morin during the course of this interview. These statements eventually formed part of the grounds for the arrest of Mr. Morin. An analysis of some of the statements made by Mr. Morin, together with a summary of how they were eventually used at trial, follows. Some of these comments were captured on tape, while others are reflected in the notes of Inspector Shephard.

"I'm really good when it comes to prediction ... I bet that little Christine is gone."

In the recorded portion of their conversation, Mr. Morin discussed his observations the evening that Christine disappeared:

> Morin: Okay, so it's starting to turn dark, so it's easily 7:30 I saw the first cop car. I said, 'Hey there's a cop car up there. Something must be going on, eh?' He [Alphonse Morin] said, 'probably not, maybe another complaint'. You know we've got complaints eh, when you do construction you get a little noisy, eh. Some you get the odd bitching. Jessops are super, I know that for a fact. He [Bob Jessop] comes around and helps the odd time, eh. But, I said, 'something must be going on'. Then the next one came up ... and you know, for some reason and I ... I'm really good when it comes to prediction — I said 'I bet that little Christine is gone.' He says, 'Christine, do you think? Nah, maybe Ken, something maybe. You know, Ken's at the age, you know, just socializing. Maybe Ken's at that age when he's starting to get into trouble eh?'
>
> Fitzpatrick: Um hum.
>
> Morin: But he's a super guy supposedly, eh. The parents say.
>
> Shephard: Well.
>
> Morin: He has an ambition to be a doctor. Then another and another and another. And then it became a charade around here. *And then we found out Ken and the officer came and said "Did you see Christine? and I said "Wholly shit dad.."*
>
> .....
>
> Why did I predict that? I, I didn't know she ...
>
> Fitzpatrick: That's what I was going to ask you. What, what uh,
>
> Morin: I don't know.
>
> Fitzpatrick: [M]ade that jump to your mind?
>
> Morin: For some reason I'm so close to many things I predict, eh ... (Emphasis added.)

Mr. Morin explained at trial that, shortly before Christine's disappearance, he had seen a television program about missing children which may have precipitated his prediction. (This became a contentious issue

at trial.)

Mr. McGuigan put forward this statement to the jury as important evidence of consciousness of guilt.[12] The comment stood out to him 'like a flashing red light' because a more likely prospect for police attendance at the home was the teenager, Ken Jessop, or the father, who had experienced some difficulties with the law. The position of the defence was that the killer would hardly advise the police that he had predicted Christine Jessop's disappearance.

"Otherwise I'm innocent."

During the tape-recorded portion of the interview, a number of non-issues came up. For instance, Mr. Morin and Inspector Shephard engaged in a discussion of construction work. They then discussed Mr. Morin's employment history and talked about the work he was doing at Interiors International Limited ("IIL"), and what kind of furniture they made:

> Morin: Beautiful veneer work like I've never seen ... amazing for woodworking ... like it's real super custom ... there's a long table like 12 feet long, easy. Joined together in the middle, certain beautiful anchor clips. They're far out in things today.
>
> Fitzpatrick: Ya.
>
> Morin: [A lengthy pause] Otherwise I'm innocent. But it's pretty bad how they treated the Regional. You know what they did around here. They said we're all guilty until proven otherwise.
>
> Fitzpatrick: Who said that?

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[12] In their written submissions to the Inquiry, Mr. McGuigan and Mr. Smith took the position that Guy Paul Morin's credibility was damaged at the second trial when he had to agree in cross-examination that, contrary to his statement to the police, he already knew his 'prediction' was accurate by the time Ken Jessop attended at his residence with a police officer (which, according to Guy Paul Morin's evidence, was about 11:00 p.m.). At his second trial, Guy Paul Morin testified that he realized his prediction was accurate about an hour after the first police car arrived. At that time, a police officer came to the 'pig fence' and asked Alphonse Morin if he had seen Christine Jessop. When confronted with this contradiction, Guy Paul Morin testified that what he said to Fitzpatrick was 'improper,' obviously, and a mistake.

Morin: Well it's not exactly what they said. But we're all suspects.

Fitzpatrick: Who's that, the Regional?

Morin: Ya.

Fitzpatrick: That's York?

Morin: That's York Regional, yeah. Isn't that bad eh? How they portray us all as being guilty. I mean I don't mind if I'm in Quebec eh. But around in here. And they say 'Hey we're going to be doing a door-to-door search' and you know they only did us.

Shephard: What they searched your house?

Morin: No, a door-to-door, coming to the people and questioning and questioning and questioning. All right, so they been to see us more than once. You guys have already been here three times eh?

Fitzpatrick: Who was here? We've never been here.

Morin: Joe, big boy.

Fitzpatrick: Oh. Loughlin.

.....

Morin: Well there was two of them like you, eh, but um, they were a little more brashish, eh. So they asked me for my phone number. I said, 'I don't give out my phone number, it's private eh'. And he said, 'What in the hell are you saying, you don't give out your phone number?' And I said, 'Not even to the band members'. There's only one who has it, some lady for the band if there's a cancellation due to weather or something. And um he said, 'For Christ's sakes, there's a goddam uh case, uh, dealing with Christine'. I said, 'What the hell does that have to do with my number?' and then he said, 'What they hell - you on drugs or what?' I said, 'Hey I never touch that shit'. I mean that's picky.

Detective Fitzpatrick testified that while the "otherwise I'm innocent" comment was not an incriminating statement itself, the fact that it came "out

of the blue" following the conversation about woodworking aroused suspicion and struck him as odd. There appears to be nothing which precipitated this statement. While Inspector Shephard did not even record the remark in his rough notes of the interview, he too stated that it stood out to him at the time.

Mr. Morin testified at trial that one of the factors that precipitated this comment was that he had heard on television one evening that York Regional Police had said that everyone within the community or the surrounding area of Queensville was considered a suspect until proven otherwise. Inspector Wilson testified at the Inquiry that, indeed, this was the public position taken by York Region. Mr. Morin disagreed that his comment was strange; he said it to breach the silence.

This statement was tendered to the jury as evidence of consciousness of guilt. Mr. McGuigan said he found it unusual that this statement followed a 10 to 12 second pause after a discussion about woodworking. During the Inquiry, Mr. McGuigan accepted that this was an innocent remark made in the context of the York Regional approach to the case.

"All little girls are sweet and innocent but grow up to be corrupt."

During the unrecorded portion of the conversation, Inspector Shephard wrote in his notes that Mr. Morin uttered the following: "All little girls are sweet and beautiful — grow up to be corrupt."

Inspector Shephard was unable to recall the context in which Mr. Morin said this, nor could he remember his tone of voice at the time. In Detective Fitzpatrick's words, it "was just an unusual comment ... which would cause an investigator to want to look further into things." In his evidence at the second trial, Fitzpatrick described this statement as one of "the most flagrant comments which we felt were unusual that would stick in our mind."

Inspector Shephard's rough notes record the following conversation just prior to this utterance:

> Christine a sweetheart. Two weeks before her disappearance, came over to see sister's puppy, more alive than Kenny. Sweet girl. Was wearing a veil and

> bees attacking him. Sowing clover. Christine said, 'Are you sowing honey seeds?,' very very innocent kid. Never heard him play saxophone.

Inspector Shephard testified that he never considered whether this comment, which later acquired significance, was simply a reflection of this same aspect of the conversation.

Mr. Morin was asked during the second trial in cross-examination about the meaning behind his statement:

> Q. Mr. Morin on September 22nd when you were speaking with Inspector Shephard — February 22nd when you were speaking with Inspector Shephard and Staff Sergeant Fitzpatrick, did you say to them 'All little girls are sweet and beautiful but grow up to be corrupt'?
>
> A. I did say something like that to them.
>
> Q. What did you mean by that?
>
> A. Well that was in relation to when they spoke to me about Christine, whether or not she was in trouble of any sort that I was aware of.
>
> Q. Yes.
>
> A. I thought, in my mind, there's no way, she's too young to be involved in any trouble.
>
> Q. Well, I suggest to you, sir and we will come back to this in a moment, I just suggest to you that February 22nd, either in the recorded portion or unrecorded portion, neither Inspector Shephard nor Detective Fitzpatrick ever asked you whether Christine Jessop had been in any trouble.
>
> A. That's not so. They did.

Mr. Morin also explained:

> Well, I was telling them, like, she was only an innocent child. She was young and there was no way, um, and I was telling them that she was sweet and innocent and

> you know, it's true that some people or children eventually do become corrupt, you know, in a later portion of their life, but not at that early stage.

It is notable that Detective Fitzpatrick commented to the Devines a week later, "it's unfortunate, kids grow up to be adults and that's who hurt each other." We will never know if a similar comment had been made to Mr. Morin on February 22, precipitating his comment, since the precise interplay during this part of the interview is unrecorded.

Susan MacLean believed that Mr. Morin's remark was a bizarre statement— it was not the way most people would view women or girls. At the outset of Mr. Morin's second trial, Alex Smith successfully sought a direction to the jury that this utterance showed Mr. Morin's motive; this is how the trial judge directed the jury:

> It is for you to consider that although these words, 'All little girls are sweet and beautiful but grow up to be corrupt' are general, since the subject matter of this interview is the disappearance and death of Christine Jessop, did those are words relate to Christine Jessop? If so, is that connection to Christine Jessop then transported from generalized hostility against little girls into a specific hostility against Christine Jessop? Do those words demonstrate in the accused's mind a motive in the form of hostility towards Christine Jessop as a little girl? If so, you may consider whether this utterance bears on the issue of the identity of the killer.

There was no doubt in Inspector's Shephard's mind that the murder was sexually motivated. In his view, the killer lost control of his victim. He agreed that this was the common sense conclusion.

Mr. McGuigan told the Inquiry that, after explaining the law on motive to the jury in his closing address, he forgot to return to the issue. Had he done so, he would have indicated that sex was a motive. Although he had not fully decided whether to submit Mr. Morin's comment as evidence of motive, in his opinion it would have been a valid motive available to the Crown.

"[Christine] was found across the Ravenshoe Road."

In an unrecorded portion of the interview, Guy Paul Morin mentioned one media account which, erroneously, reported that Christine's body had been found west of Queensville. Inspector Shephard's note recorded Mr. Morin's comment to the investigator that her body had actually been found "across the Ravenshoe Road."

Regional Road 32 is known as the Uxbridge/Georgina Townline, but it is also commonly referred to by residents as the Ravenshoe Road. It is the first east-west paved road north of both the Morin and Jessop homes. To travel a direct route from the Jessop home to the area where Christine's body was found, one could drive east along the Ravenshoe Road to Durham Line, along Durham Line to Sixth Concession Brock, across Sixth Concession Brock to Regional Road 2, and then south along Regional Road 2 to the Fourth Concession. The Ravenshoe Road ends 17 kilometres west of the body site.

Mr. Morin's statement increased the officers' suspicions of him as one who appeared to have particular knowledge of this route to the body site. Shephard and Fitzpatrick had never before heard of Ravenshoe Road, nor did they speak to any York Region officers or locals who could have advised them that the Ravenshoe Road was a main road known to any local resident.

Mr. Morin's comment regarding the Ravenshoe Road was tendered by the Crown attorneys as evidence of consciousness of guilt. In his closing address, Mr. McGuigan referred the jury to one more of the 'coincidences' in the case:

> The Ravenshoe Road is not just any route to the east of Queensville, it is the most direct route from Queensville to the location where Christine Jessop's remains were found. The accused confirmed that he told Shephard and Fitzpatrick that's probably the best route, probably the best route would be to go across the Ravenshoe Road. The significance of all of this is, in my submission, that the accused claims to have never been across the Ravenshoe Road to its terminus at Durham Regional Road 2 and to have no familiarity with the area where Christine's remains were found. The accused just picks out an east-west route, and it happens to be the best most direct route to the scene,

> terminating at Regional Road 2 just two concessions north of where Christine's remains were found. Was that just a coincidence?

Although Ravenshoe Road ended 17 kilometres west of the body site, Mr. McGuigan said that inferences could be drawn that Mr. Morin seemed to have unique knowledge of this particular area.

At the Inquiry, Inspector Wilson testified as follows:

> Q. Did you know, sir, that back in February, March, April of 1985, that Shephard and Fitzpatrick, who didn't live in York Region and weren't working in York Region, they're from Durham, were using Guy Paul's statement that would not be a surprising thing to hear from anyone in Queensville, as a reason to make him a suspect in the first place?
>
> A. No, I was not.
>
> Q. You didn't know that?
>
> A. No.
>
> Q. If you had known that, sir, would you have wised them up immediately, with, "Don't be ridiculous?"
>
> A. Just based on that, the Ravenshoe Road, the description?
>
> Q. Mm-hmm. That was a significant part of it, sir.
>
> A. I would have mentioned it, perhaps, I don't know if I would have, but perhaps mentioned that Ravenshoe Road is a well-known road within the area, if that had of been any assistance to them. I don't know if it would have been, or not.

What Guy Paul Morin Said About Timing

Detective Fitzpatrick testified that Mr. Morin's statement on February 22, 1985, as to the time of his arrival home on the day Christine Jessop disappeared aroused suspicion. He could not recall why in the recorded portion of the interview, in response to questions relating to his whereabouts

that day, Mr. Morin stated:

> That particular day I was starting [work] in the morning, about 7:00 and finished at I think was, ah, 3:30, then went shopping got home around 4:30. It only takes me 45 minutes to get home from where I work.

At a later point in the taped portion of the interview he said this:

> So that's why I'm really pissed off at myself not being there. Shopping screwed me up that time. Usually from work I would pick up the odd thing at the mall.

In the unrecorded portion of the interview, Mr. Morin referred to the time of his arrival home as "between 4:30 and 5:00." (A full discussion of timing as it related to Mr. Morin's alibi and Janet Jessop's evidence follows later in this Report.)

Police Suspicions Arising Out of the Interview

Detective Fitzpatrick said that it was after the February 22, 1985 interview that Guy Paul Morin became a suspect in the murder of Christine Jessop. According to Inspector Shephard, although he was very suspicious of Mr. Morin following this interview, he still did not consider him to be a 'prime' suspect. Nevertheless, Mr. Morin became the focus of investigative steps in the days following the interview as the utterances described above had aroused suspicion. In addition, his demeanour during the interview was viewed with scepticism by Detective Fitzpatrick:

> He seemed to be wanting to get involved with it. He ... seemed to be excited. He certainly wasn't denying — he was very talkative to us ... [and] [f]riendly.

(One can only wonder what feelings would have been generated had Mr. Morin been uncooperative or reacted with reticence.)

Detective Fitzpatrick was also cognizant of the fact that Guy Paul Morin had not wanted to provide his home telephone number and birth date to Detective Loughlin (or to the York Regional Police) in a prior routine interview. Fitzpatrick thought that this was

> just a little unusual, and again, he's not obliged to give you the phone number, but, you know, you take everything that you have and you try and put it all together and I guess it starts, starts the wheel turning.

In addition, Guy Paul Morin had not become involved in the search for Christine Jessop. Detective Fitzpatrick viewed this as

> a little different. I mean your, next-door neighbour, a nine-year-old child is missing, you know, most people would be out there searching wherever they could until all hours ... as a general rule, that's what most people would do.

During the Inquiry, Mr. Morin's counsel alleged that Crown counsel engaged in tortured interpretations of innocent remarks made by Mr. Morin during this interview with police. Mr. McGuigan's position was that although the conversation can now be seen to be innocent, he found it very unusual. He disagreed that Mr. Morin's remarks to the police were isolated from a lengthy and innocent conversation so as to direct the jury away from the conversation as a whole in a manner which distorted the innocent nature of the comments. He said that both Crown counsel and the defence urged the jury to listen to the entire tape. He denied that Crown counsel was allowed to go too far:

> In most criminal trials, I mean, you're looking for this foolproof piece of evidence that's available to establish it, and you don't have it at trials. You have this kind of evidence at a lot of trials and you cannot be precluded from using that or you might as well forget about prosecuting half the people.

Thus, it was, according to Inspector Shephard and Detective Fitzpatrick, during this interview that Mr. Morin's status changed from witness to suspect, and Inspector Shephard listed the reasons:

- He predicted that Christine was missing on the basis of seeing police cars on the Jessop grounds when there was no apparent reason for that comment, nor any indication that anyone was looking for her;

- He made a comment, "Otherwise I'm innocent," without any basis in the context of their conversation;

- He provided evidence that he was home between 4:30 and 5:00 which, in Inspector Shephard's opinion, gave him the opportunity to have abducted Christine since he knew her and would be able to abduct her very quickly;

- He was a keen musician and played a woodwind instrument. When Christine came home on October 3rd with a recorder, they may have had something in common to speak about;

- Guy Paul Morin was aware that the Ravenshoe Road was one of the most direct routes to the murder scene;

- Guy Paul Morin uttered the statement that "All little girls are sweet and beautiful but grow up to be corrupt."

Findings

Investigators are entitled (indeed, obligated) to carefully scrutinize everything they are told in a murder investigation. Nothing I am about to say is intended to diminish that obligation. Investigators are entitled to draw upon their intuition, experience, and personal observations in conducting their work. The problem identified at this Inquiry arises where officers take a certain view of matters and 'filter' everything through that view. The statements of a person regarded to be a suspect can rarely, if ever, survive scrutiny which is unduly filtered or coloured in this way. The same statements excite no suspicion when uttered by someone else.

There can be no fixed rules that certain comments should be viewed with suspicion and others should not. What the best investigators appreciate, and what must be learned by all officers, is that they must be constantly on guard so as not to allow their assessments to be unduly coloured by their suspicions. Otherwise, an investigation becomes a self-fulfilling prophecy. I visited this theme in Chapter II. Forensic scientists guard against the same danger through the 'scientific method' which I earlier described. Scientists' work becomes potentially dangerous when their assessment of data is done in the context of an attempt to link a suspect to a crime scene.

In the face of Guy Paul Morin's proven innocence, his comments on February 22, 1985 were innocuous. Some of his comments perhaps should not have excited any suspicion at the time. (For example, it is clear to me that suspicions about Morin's Ravenshoe Road comment were based more upon the officers' ignorance of the area, than upon anything else.) It is difficult (and not terribly helpful) to assess now which items should have prompted further inquiry then. That analysis misses the point. Officers are entitled to investigate even that based upon hunches. The point, here, is that the comments were 'hard evidence' of nothing. Nothing could be said even remotely to constitute an admission, or a demonstration of knowledge exclusive to the killer. The information in the officers' possession at the time did not justify any fixed view as to Morin's guilt. However, I find that Fitzpatrick and Shephard did 'fix their sights' on Guy Paul Morin — they, themselves, may not have appreciated the extent to which they did so. Subsequent interviews of witnesses (such as Ken Jessop's dentist, his receptionist, Ken and Janet Jessop), which the officers were entitled to conduct as a follow-up to the Morin interview, were unduly coloured by their premature, overly fixed views. This, in turn, affected the quality of the interviews they conducted.

I acknowledge, as Fitzpatrick and Shephard noted here, that they investigated other suspects after February 22, 1985.With respect, these investigative efforts were unduly coloured by their view of Guy Paul Morin. I was advised that, after Guy Paul Morin was arrested, and indeed after his acquittal, Fitzpatrick and Shephard investigated other suspects and were open-minded about it. With respect, their investigative efforts at that stage were unlikely to reveal anything which pointed away from Guy Paul Morin. Their views were too fixed to permit that level of introspection (which I concede would be extremely difficult for the best investigator at that stage, given their determination that they had the right man, had arrested him and brought about his prosecution.)

Mr. McGuigan commented that "[y]ou have this kind of evidence at a lot of trials and you cannot be precluded from using that or you might as well forget about prosecuting half the people." If Mr. McGuigan's point is only that many criminal cases are circumstantial, and depend upon individual pieces of evidence which may not be significant by themselves, I agree. However, it is my view that judges must be particularly vigilant in assessing, both for admissibility and for ultimate use either by the jury or themselves, equivocal, ambiguous, ill-defined remarks, often dependent on the witness'

subjective assessments, perceptions or feelings, tendered as evidence of 'consciousness of guilt.' This theme is a recurrent one throughout this Report.

(viii) Timing and Morin's Place of Work

Three days after the interview, on February 25, 1985, Inspector Shephard and Detective Fitzpatrick obtained Guy Paul Morin's IIL work records; his time card showed that on October 3, 1984, he had left work at 3:32 p.m. The detectives then conducted a timing run from his workplace to his home, a distance of 57.1 kilometres. It took 42 minutes. Assuming that Guy Paul Morin stopped nowhere, that would bring him home no earlier than 4:14 p.m.

According to the 4:10 p.m. time that Janet Jessop and her son had consistently provided to the York police for their arrival at home, Mr. Morin did not have a realistic opportunity to abduct Christine.[13]

After their timing run, Shephard and Fitzpatrick went to Dr. Taylor's office for the first time and spoke with him and Ms. Lowson, his receptionist. At the conclusion of these interviews, Mr. Morin was seen by the detectives to have had a 'window of opportunity' to have abducted Christine, because both Dr. Taylor and Ms. Lowson claimed that the Jessops had left the dental office at 4:20 p.m. or even later. The time at which the Jessops and Guy Paul Morin arrived at their respective homes therefore took on importance and this is discussed below.

(ix) The Time That Janet and Ken Jessop Arrived Home: From Investigation to Trial

The Jessops' Early Accounts

Janet and Ken Jessop were interviewed by York Regional Police on several occasions in the days immediately following the disappearance of Christine; they both maintained that they arrived home from Newmarket at

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[13] It was suggested that Christine Jessop could have been abducted other than from her home or its immediate vicinity and therefore, the 4:10 time did not preclude his involvement. It is unnecessary to resolve this issue. The officers clearly proceeded on the basis that the 4:10 time was problematic vis-à-vis Mr. Morin as a suspect.

4:10 p.m. on the day Christine disappeared.

In the original occurrence report prepared by Constable Rick McGowan on his arrival at the Jessop home that evening, he recorded the 4:10 p.m. arrival time.

In the early morning hours of October 4th, while the search for Christine was in full force, Ken Jessop was awakened by an officer and asked to provide a handwritten statement. (I briefly described this event in Chapter IV.) While this statement was subsequently lost, the supplementary report reflecting Ken's detailed statements includes a notation that he and his mother returned home at 4:10 p.m. from the dentist.

In a statement apparently taken in the early morning hours of October 4th, Janet Jessop again reported:

> Then we went to the dentist on Eagle Street, Newmarket, Dr. Taylor. I left Ken there and I took my telephone back to Bell Canada on Main St. Then I walked to Household Finance. Then I picked Ken up, it was about 4:00 p.m. and we came straight home. We got home at about 4:10 p.m. ... I called the Lawyer at 4:45 p.m.

Ken Jessop was re-interviewed on October 6, 1984 at the Queensville Community Centre by Inspector Wilson and Detective Eugene Kerrigan. Again, he told the police that he arrived home at 4:10. He substantiated this time by indicating that he had 'looked at his watch.'

On January 8, 1985, the day following Christine Jessop's funeral, and on January 9 and 10, Bob and Janet Jessop attended at the Sunderland police station for an interview with Detective Reginald Webster. His partner, Detective Joseph Loughlin, may have been present at some point in time. On the latter two days, the Jessops were questioned about friends, relatives, acquaintances and neighbours. Detective Webster took notes of the interviews as it proceeded, on loose paper which he later discarded after converting the information into a lengthy (25-page) supplementary report. His report contains the following notation:

> Presently Kenneth Jessop is a student at Huron Heights High School in Newmarket where he attends Grade 9.

> It may be noted that on the day of the disappearance he was with his mother Janet, arriving home at approximately 4:20 to 4:30 p.m.

At the stay motion, Detective Webster was asked whether that information had been provided to him by Kenneth Jessop. He responded:

> It's a compilation of information. There was some information on York Regional reports. There was information obtained from Janet Jessop. I would have to say at this time that this information is probably from those two sources and not necessarily from Kenneth Jessop directly.

Detective Loughlin was asked this at the stay motion:

> Q. Was there any importance to you as an investigator to determine as precisely as you could what time the Jessops had arrived home and where Mrs. Jessop had been prior to phoning the police, after her arrival home?
>
> A. Yes. We asked those questions. I believe we also — a lot of that information was supplied to us by the York Regional Police.

Detective Loughlin could not recall whether the York Regional times were reviewed with Ms. Jessop but did not believe any reports were taken to the interview. He did not recall questioning Ken Jessop nor did he know if another investigator had done so.

The York Regional reports, as discussed above, did not refer to a time of 4:20 to 4:30.

According to Inspector Shephard's supplementary report on the interview of Ken Jessop that was conducted on February 14, 1985, Ken told the officers that he arrived at the dentist at 3:40 p.m., 10 minutes late for his appointment.[14] He said that he was:

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[14] At the time of this interview, Detective Fitzpatrick had read the general occurrence report dated October 3, 1984, indicating that the Jessops told the York Regional Police they arrived home at 4:10 p.m. He was also aware that Detective Loughlin's supplementary report dated January 10, 1985 reflected that he had met with the Jessop

> only in the dentist then [sic] minutes all he did was just a check-up. I had to wait for my mom.
>
> I think likely it was around 4:10 p.m. when she picked me up. Then we drove straight home to Queensville. When we came in the home I remember Mom looking at the clock and saying it was 4:20 p.m. She said she had time to have a coffee and think about what she was going to say to the lawyer ... when she called him at 4:45 p.m.

Inspector Shephard's notebook entry reflects that Janet Jessop was present during the interview and answered most questions, either before or while Ken Jessop was talking.

Eight days after this interview — the same one in which Ms. Jessop referred to Mr. Morin as a "weird-type person" — Detective Fitzpatrick and Inspector Shephard formally interviewed Mr. Morin, as discussed above. Detective Fitzpatrick told the Inquiry that it was probably after Mr. Morin became a suspect that they began to question the 4:10 time.

Meanwhile, in a "Citizen's Alert" program taped on February 20, 1985, Ken was depicted arriving at the dentist at 3:20 p.m.; the Jessops arrived home at 4:10 p.m. Ms. Jessop played the role of herself in this docudrama depicting her daughter's disappearance and murder. The kitchen clock was shown hanging on the wall reflecting the time of 4:10 when she and Ken arrived home. This was telecast by Global Television Network on March 15, 1985. These times, and the presence of the Jessops' kitchen clock in the docudrama, became an issue in the second trial and will be discussed later in this chapter.

After ascertaining that Mr. Morin had 'punched out' of work at 3:32 p.m. on October 3rd, Detective Fitzpatrick and Inspector Shephard measured the distance from the Morin residence to the site where Christine Jessop's remains were found. By taking the Ravenshoe Road route it was 51.4 kilometres. Driving faster than the speed limit, it took them 32 minutes to complete the run. In a subsequent timing run conducted on May 26, 1985, at

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family and that Ken and Janet Jessop had arrived home at 4:20 to 4:30 p.m. He indicated he was not aware that Ken and Janet Jessop had given York Regional officers independent statements at different times confirming the 4:10 p.m. time.

normal speeds, traveling the same route, the drive took 39 minutes to complete. A timing run from IIL to the Morin residence, as pointed out above, took 42 minutes, which meant that the earliest Guy Paul Morin could have arrived home was at 4:14 p.m.

The Dentist and his Receptionist

After establishing that Mr. Morin had left his workplace at 3:32 p.m. the afternoon Christine Jessop disappeared, and, following their timing run between Mr. Morin's workplace and his residence, Detective Fitzpatrick and Inspector Shephard spontaneously attended the office of Dr. Paul Taylor to interview him and staff members about their recollection of the arrival and departure of Ken Jessop on October 3, 1984.

Shephard could not recall whether the two were questioned individually or together. Inspector Shephard agreed that the supplementary report of the interview suggests that Dr. Taylor had no independent recollection of the times Ken Jessop's dental examination commenced and ended. In calculating the length of time that he spent with Ken, Dr. Taylor extrapolated from the usual patient examination time. Further, there were differences in Dr. Taylor's and Ms. Lowson's recollection as to when Ken Jessop left the office. While no specific witness statement was taken at this time from these witnesses, Inspector Shephard's notebook entries suggest that the interviews were completed in approximately 12 minutes. The supplementary report documenting the interview states as follows:

> Dr. Taylor said that to the best of his recollection, he recalled Kenny's examination began at 3:50 p.m. and probably finished at 4:05 p.m. He could recall going out into the waiting room and seeing Kenny sitting, waiting for his mother to pick him up. *Dr. Taylor said he felt it was around 4:30 p.m. However, Dr. Taylor said he had spoken to his nurse and receptionist both girls thought it was 4:20 p.m. when Mrs. Jessop came in to pick Kenny up.* Dr. Taylor said that Mrs. Jessop dropped Kenny off at the office and because it was his first visit, *Kenny had to fill out a card which was placed in his file. This is why he was certain Kenny's examination didn't start until 3:50. Examinations last anywhere from 15 to 30 min. again this is why he feels Kenny's was finished at 4:05 p.m.* He also recalls Kenny having to wait for sometime for his mother to

> pick him up. Dr. Taylor said the police had never spoken to him about this matter. (Emphasis added.)

Ms. Lowson expressed more certainty about the times:

> Lorraine Lawson (sic) ... said she had spoken to Mrs. Jessop several times and she was anxious to meet her. *She said Kenny came into the office by himself at 3:40, ten minutes late* for his appointment. After his examination, she could recall Kenny sitting in the waiting room waiting for his mother. *Lorraine was certain it was around 4:20 pm when Mrs. Jessop came in to pick up Kenny.* Mrs. Jessop didn't stop to pay her account she simply pick up (sic) Kenny up and left. (Emphasis added.)

(A supplementary report filed by Officer Bunce indicates that on December 7, 1984, he spoke to Ms. Lowson who at that time advised that Ken Jessop had kept his October 3, 1984 dentist appointment. She did not then provide information on the issue of times nor would it appear that she was asked.)

Dr. Taylor and Ms. Lowson testified at both Mr. Morin's second trial and during the Inquiry. Their evidence was that Ken arrived approximately 10 minutes late. Dr. Taylor said it would have taken at least five minutes, and possibly more, for Ken to have filled in a history card provided to all first-time patients. He did not begin his examination until 3:50 to 3:55 that day. He performed a new patient examination, took four X-rays, charted his cavities and existing fillings, and talked to him at some length about his oral hygiene. This took until 4:00 p.m. or later. Dr. Taylor further recalled speaking with Ken sometime around 4:20 that afternoon while he was seated in the reception area waiting to be picked up by his mother. Ms. Lowson testified that Janet entered the office at approximately 4:20 that afternoon; she was in a hurry, and told the receptionist that she would take care of the bill at a later time.

Ms. Lowson testified that a day or so after Ken Jessop was in the office she was driving with her boyfriend Richard Pike (now her husband), a constable and now Staff Sergeant with the York Regional Police force, when she heard a news broadcast indicating that Janet Jessop had returned home at 4:10 p.m. that day. She immediately told her boyfriend that this had to be wrong. At the Inquiry, Ms. Lowson said that she and Dr. Taylor

discussed it, and they agreed that, according to their recollections, the timing was not possible. Ms. Lowson gave this information to Detective Fitzpatrick and Inspector Shephard during the February 25, 1985 interview.

Staff Sergeant Pike was not interviewed until September 11, 1989, four and a half years after the event. He agreed that Ms. Lowson told him *sometime* that Janet Jessop could not have returned home by 4:10 p.m. on the afternoon of October 3rd, and that he had passed this information on to Detective Bunce. Detective Bunce, who was questioned about this at the Inquiry, could not recall such a discussion with Staff Sergeant Pike. Because no contemporaneous note or supplementary report was made by Bunce at the time, it is impossible to determine if his lack of recollection is the result of a faded memory or error on the part of Bunce or Lowson. Detective Fitzpatrick's supplementary report of his interview with Staff Sergeant Pike says this:

> Pyke (sic) went on to say he cannot say for sure when she [Ms. Lowson] told him, but it was after a news broadcast either on TV or the radio. He can't remember if it was before or after Guy Paul Morin was arrested. No other information.

In 1990, Detective Fitzpatrick called Staff Sergeant Pike to ask if he remembered the date of Ms. Lowson's disclosure to him; he said he did not. However, on February 21, 1991, Pike submitted a signed will-say which pinpointed the day of Ms. Lowson's disclosure:

> In October of 1984, I believe it was the day after Christine Jessop was reported missing at lunch time, I had conversation with one Lorraine Lowson. During that conversation, she told me that the news report on the public radio in regard to the Christine Jessop missing report was wrong.
>
> Specifically, she was adamant that the time reported on the radio was wrong because Mrs. Jessop was at Lorraine's office at a time that would conflict with the time Christine was reported as missing.

Following the February 22, 1985 interview of Dr. Taylor and Ms. Lowson by the detectives, they were re-interviewed on as many as 11 to 12 separate occasions, sometimes by police officers, other times by Crown

attorneys. Dr. Taylor testified that when Shephard and Fitzpatrick interviewed him, they took notes in a little black notebook; however, there were no such notes in the officers' notebooks detailing their conversations with Dr. Taylor and Ms. Lowson. Dr. Taylor described these interviews as somewhat repetitive, pre-arranged and comprised of friendly questioning. The officers were professional and courteous, in contrast to Taylor and Lowson's opinion of Mr. Pinkofsky's private investigator, Basil Mangano, whom they had met three or four times. Dr. Taylor found Mr. Mangano more aggressive. He was not happy that the investigator had a tendency to drop in without prior arrangements. Mr. Mangano was described by both Dr. Taylor and Ms. Lowson as persistent, impolite, inconsiderate and a little unpleasant.

While timing did become a crucial issue in the prosecution and defence of Guy Paul Morin, it is curious that the dentist and his receptionist were interviewed so many times on what was relatively straight-forward information.

March 6, 1985 Interview of Ken and Janet Jessop

Based on their interview with the dentist and his receptionist, Detective Fitzpatrick and Inspector Shephard were certain that the Jessops had erred in putting forward their arrival home as 4:10 p.m. The Taylor-Lowson times seemed more reliable because they were neutral parties who offered the information without hesitation. The detectives timed the drive between Dr. Taylor's office in Newmarket and the Jessop home. Even when Detective Fitzpatrick drove as quickly as possible, and sometimes exceeded the speed limit, the fastest travel time was 14 minutes.

On March 6, 1985, at 10:45 a.m., Detective Fitzpatrick and Inspector Shephard went to the Jessop residence to interview Ken and Janet regarding the timing of their activities on October 3, 1984. Detective Fitzpatrick told the Inquiry that although he could not specifically recall doing so, he was sure he "read the [York] reports or tried to, before going up there, had checked the reports concerning times." The evidence of both Detective Fitzpatrick and Inspector Shephard was that Janet and Ken Jessop were not separated during the interview, despite Janet Jessop's interjections during their interview of Ken Jessop three weeks earlier. The interview was not tape-recorded. No formal statement was taken nor were there detailed notes in the officers' notebook of this two and one half hour meeting. Detective Fitzpatrick's rough foolscap notes were discarded or were mislaid before trial. The only record

of the interview is a supplementary report prepared by Detective Fitzpatrick on March 11, 1985. It states as follows:

> On March 6, 1985, at 11:00 hours Detectives Fitzpatrick and Shephard attended Queensville and interviewed Janet and Kenneth Jessop with regards to the times that they arrived home on October 3, 1984.
>
> Through taking both step by step through their times and their traveling on that date, it was found that Janet and Ken arrived home some time around 16:35 hours (4:35 pm), not 4:20 pm as originally stated.
>
> Janet maintains that it was 4:20 pm on the clock when she entered the house. When suggested that their clock could be slow, she said that could be a possibility as they are having problems with the electric clock.
>
> Due to this fact, it appears that the suspect would have longer time than originally stated to pick-up Christine.
>
> Investigation continues.

In relation to the disparity in time from that originally provided by Janet Jessop, Inspector Shephard said this at the Inquiry:

> I just thought ... they've made a mistake ... and I put more faith in what the dentist told me and what Lorraine Bolson (sic) told me in regard to the times, because ... they're dealing with times all the time and the fact that Janet said she looked at the clock ... — I didn't [give it much] credibility.

Detective Fitzpatrick, testified during the second trial that "[w]e knew that Janet's times were wrong"; in his opinion, it was almost impossible for her to have arrived home at 4:10. In his evidence before the Commission, he said:

> [W]e certainly went there [the Jessop residence on March 6, 1985], I suppose, with the idea of telling them that they couldn't have been home at 4:10

Accordingly, Detective Fitzpatrick said that his suggestion to Janet Jessop that her clock was slow was put forward as a 'face-saving scenario'

to permit her to gracefully change her position on the time. Neither he nor Inspector Shephard believed that the clock was, in fact, slow. In their view, feelings of guilt motivated Janet Jessop to lie about the time she arrived home in her earlier accounts to the police:

> [W]e felt that in all probability that ... she did this in order, I suppose, not to be accused of being a bad mother, not being home when her child got home from school, or for whatever her reasons were. And of course, if you are going in to interview her — I mean, she'd just gone through a traumatic experience, and she is a victim, and you're certainly not going to go in and call a lady: You're a liar, et cetera, et cetera.
>
> So we felt that the best way to do it was to take her ... step by step, through what she did that day, and hopefully show her that she couldn't have been home at the time that she said, at 4:10.

Inspector Shephard did not appreciate how Ms. Jessop's evidence could be tainted by the question "Could your clock have been slow?" In his view, "she had a perfect right to say 'No, my clock wasn't slow. I'm sorry, I got home at 4:10.'

Inspector Wilson, however, had earlier confirmed the accuracy of the Jessop kitchen clock by checking it against his own wristwatch. Fitzpatrick said that he was not cognizant of this fact at the time he made his suggestion to Ms. Jessop;[15] neither was he aware that Ms. Jessop had told the York police that she had looked at the kitchen clock in determining the time of her call to her lawyer at 4:50 p.m. The Jessop telephone records which were later obtained confirmed that the time of that call was 4:49 p.m. Nonetheless, when this information was provided to Inspector Shephard at the Inquiry, it did not cause him to re-evaluate the accuracy of Ms. Jessop's original estimate of her arrival home.

Detective Fitzpatrick told the Commission that in taking the Jessops through their activities on the afternoon of Christine's disappearance they were told that their times were wrong; they may have been told the times

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[15] As Inspector Wilson testified at the stay motion, he did not make a report or note of this fact.

provided by Dr. Taylor and Ms. Lowson, and that it was impossible for them to have arrived home at the time indicated. They were asked questions such as "could you have been five minutes longer at the dental office," or "could you have been five minutes longer in getting there." (Inspector Shephard's recollection was that they did not tell the Jessops they were wrong.)

Ken Jessop told the Inquiry that the March 6, 1985 interview occurred just as he was recovering from mononucleosis. According to him, he was interviewed alone, after his mother. He was told by Detective Fitzpatrick that his times were wrong but he maintained in the interview that they arrived home at 4:10. He said that Detective Fitzpatrick's tone of voice and body language during this interview were "very strong." He described the encounter as follows:

> They said: We're going to run through the times again, ran through them, and: What time did you get home? 4:10. Well, how could you? You couldn't have. That's when I got home. I said that to York, I looked at my watch and they said: No, you were not home at 4:10. You could not possibly have been home at 4:10.
>
> And that automatically starts throwing doubt into your own statements that you've already given, because you're fourteen years old and you're being told by police that you're mistaken, you're wrong. And when you know that you're not, though, it's — you want to believe them, because they're the police. Your faith is in them. They're the authorities. They're the ones that are supposed to know.

When he disagreed with the officers regarding the time, they reviewed the Jessops' actions with him yet again:

> But this time, they were adding in: Well, could you have been five minutes longer here than you originally stated? Could you have been five minutes there a little longer? And then when they finished doing this, they added it all up, and it came out to 4:35. I don't know what else to say.

Mr. Jessop told the Inquiry that he voiced his disagreement about the times to the investigators and told them that he had looked at his watch, which he had purchased that day, upon his arrival at home. While Detective

Fitzpatrick recalled Ken's comment to him about his watch, this only led him to question his reliability on the 4:10 time, given his February 14, 1985 indication that he arrived home at 4:20. The investigators felt that Ken Jessop was simply going along with his mother's account. Ken Jessop told the Inquiry that after the investigators left, he spoke briefly with his mother about the interview. His recollection was that Ms. Jessop was angry and confused about being told the time was wrong. This anger and confusion was reflected in her telephone conversations that same afternoon.

Telephone Intercept Log

Robert and Janet Jessop consented to the interception of their telephone line by the Durham police to record incoming calls in the event they may assist in the investigation. Ms. Jessop's understanding was that only the caller's half of the conversation would be recorded. Ms. Jessop had misunderstood. The content of the full conversation was recorded and summarized in the logs kept by the police. Interceptions were conducted during the month of February and during the first week of March 1985. The tapes of the recorded conversations were taped over but a log summarizing the calls was preserved.[16]

According to Inspector Shephard's notebook entries, the March 6, 1985 interview began at 10:45 a.m. and ended at 1:15 p.m. at which point the investigators attended at the Morin residence.

On March 6, 1985, at 12:54 p.m., the following telephone call by Ms. Jessop is recorded in the log. In her evidence at the Inquiry, Ms. Jessop could not say whether the Durham officers were still at her home, in another room, at the time she made the call:

> 1254 Janet called Eastern Telecom and spoke to Heather. Wanted Bob. Talk about Durham being there and how she couldn't tell Durham anything about what York's doing. Durham's

[16] It was disclosed to the defence, pursuant to an order of Justice Donnelly on January 10, 1992. The trial had already commenced and Robert Jessop had testified (he was not recalled). The Crown had taken the position in May 1991 that it would disclose log entries relating to police contact only but otherwise took the position that the logs were not relevant and the privacy interests of the Jessops must be protected. The Jessops declined to make submissions on the disclosure application.

> not telling York what's done, and are doubting what York has done. They were up questioning times and Janet can't remember times.
>
> I perfer (sic) to deal with York and I'm not giving Durham anymore messages. I'll call York from now on. Durham is doubting York's work and have no sympathy for victims. York is much better. Janet wants to wait, and see how Durham will treat her when the court date comes.

The log also recorded the following call that day at 1:02 p.m. in which Ms. Jessop indicates that the Durham officers "just left":

> 1302 Bob called collect and spoke to Janet. [She] [t]old Bob that she was discussed [sic] with Durham who just left.
>
> .....
>
> 1304 Janet called [York Regional Police] 19 Division for Det. Nechay. Apologized for not calling back right away but "THEY" walked in, Durham. Talk about Jessops visiting different car dealers and Christine being along. Talk about Durham questioning her about times, and that *York followed her and had times.* Janet didn't like the fact that Durham asked about Hanson case. Janet didn't appreciate it. Wanted to know if she could do anything about their questioning. Janet doesn't like much about contradictions and the fact that the same two detectives were the ones that brought up about the adoption and she doesn't like him, he's too gruff. (Emphasis added.)

Allegations of Pressure

The above telephone calls suggest that Janet Jessop continued to harbour reservations about her timing at the end of the interview with the Durham detectives. While it was Inspector Shephard's opinion that by the end of the interview, both Janet and Ken had accepted the later time as more

accurate, Janet Jessop told the Inquiry that this was not so. She did not agree with counsel for the Morins that the logs demonstrated 'bullying' by the police during the March 6th interview; she preferred to speak of 'pressure,' which she later defined to mean "reminding very strongly, almost to a badgering. Never letting go" over a long period of time.

Both Detective Fitzpatrick and Inspector Shephard denied pressuring Ken or Janet Jessop to change their times although, in hindsight, Inspector Shephard said that he could appreciate the Jessops' perception that they had been pressured. Detective Fitzpatrick preferred to speak of 'persuasion':

> A. I don't think that we tried to persuade her, I don't think we placed pressure on her. As I said, what we did is took them step by step in an attempt to show the, you know, that you couldn't have been home at the time you said you were at home. If you want to classify that as persuasion to your mind, then maybe you do, I don't. I just put it that, you know, you're taken to events, what you did, so therefore your time could be off.

The police notebook entries reflect that after the March 6, 1985 interview, up to and including the date of Mr. Morin's arrest, Ms. Jessop was interviewed by Inspector Shephard and Detective Fitzpatrick on eight occasions. The times, she said, "always kept coming up, yes. It was always mentioned."

However, in contrast to her evidence at the Inquiry, when Ms. Jessop testified during the stay motion and was cross-examined by Crown attorney Brian Gover, she denied that she had been pressured by any police officer or Crown attorney to change the time of her arrival: "Absolutely not. To the contrary, they have said: Don't — You know, be as sure as you can." Mr. Gover told the Commission that, during their pre-testimony interview, Ms. Jessop categorically denied that her change in times was caused by police pressure. Ms. Jessop could not tell the Commission how these two positions could be reconciled.

During her cross-examination at the Inquiry by Mr. Shephard's counsel, Ms. Jessop was asked about the pressure she said was exerted on her by the detectives to change her arrival home time:

> Q. [I]s it possible that you when you say pressure, a

lot of it comes from the fact that, as you said yesterday, you wanted to be helpful?

A. Yes.

Q. Did that add to it?

A. Well, I'm not a psychologist, or psychiatrist.

Q. Okay. Is it hard for you to define the pressure? You just felt pressure —

A. You feel — we felt it. It's like emotion. You feel emotion.

Q. Right. And you felt the pressure?

A. You felt it.

Q. And you felt that a lot of the time?

A. Mm-hmm.

Q. Before and after your daughter was found?

A. It's a different kind of — if you're going to use the word pressure, it's a different type of pressure.

Q. But pressure?

A. You call it pressure, I have other - I wouldn't call everything pressure, no.

.....

Q. And I'm going to suggest to you that the pressure you felt was that you understood you could have been wrong, that you wanted to be cooperate, that you didn't want to impede the investigation, and that you felt, therefore, that as the police said, you had to be sure, and that that was the source of any pressure. Do you agree with that?

A. No.

Q. Do you understand that the police were being very careful that the time that you returned home, that you

were sure about —

A. That's right.

Q. And that you felt pressure because of that?

A. I guess you could — well, if you call — I don't know whether I'd use pressure, but it was — yes, you had to be correct and cooperative.

Q. And you didn't want to be wrong?

A. Well, no.

Jessop Timing — Post-Arrest Conversations

After Mr. Morin's arrest on April 22, 1985, Ken and Janet Jessop appreciated the importance of time estimates to the prosecution's case. Ms. Jessop told the Inquiry that the police told her that Guy Paul Morin could not possibly have committed the offence if she arrived home at 4:10. Both the police and the Crown attorneys made it very clear to her that timing was very important to the prosecution of Guy Paul Morin.

Ken and Janet Jessop conceded that once Mr. Morin was charged with the murder of Christine, they were convinced he was guilty. They attributed this belief to the confidence which the 'authorities' had in his guilt.

Ken Jessop testified that both leading up to and following the first trial, he and his family were told by the detectives that Mr. Morin was being investigated in connection with two other murders of a sexual nature, one of which involved a victim found one or two concessions from where his sister's body had been found and the other involving an abduction from a location in Toronto in close proximity to the Morin's residence prior to their move to Queensville. According to Ken Jessop, his father also conveyed his opinion on this point but he was quite sure his father did not do so before the police provided this information. Ken Jessop said that this information made him "believe even more whole-heartedly that they had the right accused." It also heightened his resolve and hatred against Mr. Morin.

Both Detective Fitzpatrick and Inspector Shephard denied suggesting to Ken or Janet Jessop that Mr. Morin was a serial killer. In Fitzpatrick's view, to do so would be totally wrong; however, in this regard, the interviews

with Paddy Hester and Frank Devine must be considered wherein the prospect that Mr. Morin would commit 'another' murder was discussed.. (This is developed in greater detail in the section dealing with the interview between Detective Fitzpatrick and Ms. Hester and the interview of Mr. Devine and Inspector Shephard).

According to Ken Jessop, he was provided by the officers with information relating to Mr. Morin's masturbation habits. He also told the Inquiry that, on numerous occasions, the two detectives described the Morins as "an incestuous-type family." Both Detective Fitzpatrick and Inspector Shephard denied making such comments. During Ken Jessop's cross-examination by counsel for Detective Fitzpatrick it was suggested that Ken learned of Mr. Morin's masturbation habits during the psychiatric evidence put forward at the first trial.

Ken Jessop also told the Inquiry that Detective Fitzpatrick referred to Mr. Morin as "Moron," but Fitzpatrick denied that this type of language was used by anyone other than Janet Jessop.[17] These discussions, Ken said, poisoned his attitude towards Mr. Morin and his family. He added that, in hindsight, "it was almost as if ... they were trying to keep us convinced that it was him."

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[17] In contrast, Brian Gover testified during the Inquiry that he specifically recalled Shephard, Fitzpatrick and Chapman referring to Mr. Morin as "Guy Paul Moron":

> Q. Guy Paul Moron. Who referred to him that way?
>
> A. Well, I recall that the police did that. I recall frankly, I think that all of the police officers did that, and by that, I include Inspector Shephard, Staff Sergeant Fitzpatrick and Sergeant Chapman. Now ironically, the one person I distinctly recall saying that was Sergeant Chapman, and of the three of them, he was the one for whom I developed a true respect.

Mr. Gover did not recall any of the Crown attorneys using a pejorative term to describe Mr. Morin.

The Jessops' Testimony relating to Timing

Preliminary Inquiry and First Trial

Ken Jessop did not testify at the preliminary hearing or Mr. Morin's first trial. In Janet Jessop's evidence at both the preliminary inquiry and the first trial, she related the time of her arrival home by reference to the time of her call to the lawyer and estimating backward from that time, the time it may have taken her to complete her activities upon her arrival home.

During the examination-in-chief at the first trial, she was not asked what time she returned home. Rather, John Scott, the Crown Attorney, wanted to know what time *she had told the police* that she had arrived home:

> Q. [On October 3, 1984] did you provide any information [to the police] relating to the time that you had thought you got home from the dentist?
>
> A. Yes, I did.
>
> Q. And what time was that?
>
> A. Well, I know for a fact that *at ten to five, I had to make a call to a lawyer* in the city, which I did, and before that, as I say, we had looked around thoroughly and I had made a few phone calls, and I thought, which I could be wrong, it was around ten after, quarter after four I got home, but I could be wrong.
>
> Q. *What information did you provide to the police that evening if you recall as to the time you got home*?
>
> A. *I think I told them around ten after, quarter after four*. (Emphasis added.)

In cross-examination she said this:

> Q. You said there was some uncertainty in your mind as to when you arrived home on the day of the disappearance. What is your best feeling about when you arrived home, leaving aside what others have said? Just what is your best recollection?
>
> A. Well, not having a watch on that day, *I'm going by*

> *the time I called the lawyer, and that was ten to five, and knowing what I did before I called, it wouldn't take me any more than maybe ten, fifteen minutes* at the outside to look around the house, go outside, make a few phone calls to girlfriends. I couldn't have been at home much more than fifteen minutes, so maybe my timing is way out as far a what time I came home.
>
> Q. *Why are you sure about ten to five*?
>
> A. *Because I looked at the clock deliberately, thinking I had to call this person at that time.*
>
> Q. And you think it was about 15 minutes associated with looking around before you called?
>
> .....
>
> A. It couldn't have been more than that. Ten minutes at the most to look around the home. I went out the back and called, made a cup of coffee and sat down.
>
> Q. So tell me if I'm being correct and fair. *You think it was 10 to 15 minutes you were there before making the phone call, making the coffee, looking around?*
>
> A. *Yes.*
>
> Q. Ten to 15 minutes?
>
> A. Yes. (Emphasis added.)

The Stay Motion

As noted above, by the time the stay motion was heard, John Scott was no longer acting as the prosecutor on this case. Brian Gover, the Crown counsel who had carriage of the motion, spoke with Mr. Scott about the reliability of Ms. Jessop. According to Mr. Gover's evidence at the Inquiry, the following excerpt from Kirk Makin's book, *Redrum the Innocent*, is an accurate account of the warning he received from Mr. Scott about Ms. Jessop's evidence:

> As Brian Gover put it: "I had been warned about Janet Jessop." ... Gover said there was a general feeling among prosecutors that Janet was capable of saying

> anything that came into her head if she thought it would further the prosecution of Morin. "I was warned, for example, that in interviewing her, she would ask *me* questions sometimes. She would say: 'Does that help you? or: Would it help if I said X?' and so on".

Mr. Scott advised him to be careful with Ms. Jessop because of her "willingness to buttress the evidence by going beyond personal experience." (This matter is discussed in further detail in the section of this Report dealing with the evidence of screams the night of Christine Jessop's funeral.)

Mr. Scott could not recall this warning, but he admitted that he had concerns about Ms. Jessop's reliability on the timing issue and on some of the information she related. It was his experience, he told the Commission, that she would often say things that came into her head, but he did not believe she would say anything to intentionally mislead the process in order to assist the prosecution. He did not find her to be a witness who could articulate her thoughts well. Like Fitzpatrick, Mr. Scott believed that she had minimized the time of her arrival home because of feelings of guilt. In arriving at this conclusion, Mr. Scott considered that neither Janet nor Ken Jessop told him that they arrived home at 4:10 p.m. In all their dealings with him, they had spoken of 4:35 p.m., or 15 minutes before contacting the lawyer. This point becomes important in considering Mr. Scott's involvement in the editing of Ken Jessop's will-say statement, which is discussed later in this report.

The Role of the Kitchen Clock

Ms. Jessop testified that she was shocked when Mr. Morin was acquitted. Once she knew there would be a second trial, she was anxious to cooperate in any way possible to assist the prosecution. Ms. Jessop was called to testify at the stay motion by the defence. She told the Court that she had thrown the kitchen clock out because it was not keeping proper time (and that she had told both the Durham and York police of doing so). During cross-examination by Crown attorney Brian Gover, Ms. Jessop testified that the kitchen clock had indicated either 4:10 or 4:15 upon her arrival home and that she discarded the clock two weeks later because it was losing time. Inspector Shephard (who was not present during this testimony) testified that he was not aware that Janet Jessop would give such evidence about the clock. *Had he heard her say so, he stated that he would have brought it to the attention of the authorities as it would have been his obligation to do had he heard a*

witness give false evidence. Mr. Gover's recollection was that Ms. Jessop told him (prior to her evidence) that she had advised either Detective Fitzpatrick or Inspector Shephard that she had discarded the clock because it was slow. Ms. Jessop also testified at the stay motion that on March 6, 1984, after the police took her through her activities on October 3, 1984, she told them that she arrived home at approximately 4:35 p.m., but *she maintained that the clock in the kitchen said 4:20,* regardless of the actual time.

In February 1992, Ms. Jessop told the jury at Mr. Morin's second trial that she got home between 4:30 and 4:35 p.m. Cross-examined on the disparity of her reported times, she agreed with Jack Pinkofsky's suggestion that she used the same kitchen clock not only to determine the time she arrived at home, but also when to call the lawyer:

> Q. [A]nd when the police started questioning you, whether Inspector Shephard or Fitzpatrick in the first instance, but when they started going over with you the times that you had provided the York Police Department, you kept telling them, did you not, that you got home around that time, 4:10 to 4:15?
>
> A. That's right, but at the time, you must remember, I'd lost my daughter, and my husband wasn't there. These are strictly estimates.
>
> Q. I appreciate that, but it was an estimate that was based on you looking at a clock, as you told us yesterday?
>
> A. That's right, but that clock was also out.
>
> Q. On October 3rd, the clock was on, bang on within a minutes (sic), wasn't it?
>
> A. Well, I don't really agree, don't know that, right?
>
> .....
>
> Q. Did you tell Detectives Shephard and Fitzpatrick that you had already given York the accurate times and: why are you bothering us about this again?
>
> A. Yes, sure.

And further:

> Q. And as a result of seeing that [Bell Canada] receipt you realized that, you must have realized that when the call shown on that receipt was made at — was it 11 minutes to 5 on October 3, 84, ... and when you looked at your kitchen clock, the kitchen clock at the time you made the call said 10 to 5, correct?
>
> A. Yes, sir.
>
> Q. So that must have meant to you, when you saw the receipt that was presented to you by Detective Shephard or Fitzpatrick in January of '85: Gee, at least as of October 3rd, '84, my kitchen clock was working pretty good; Right?
>
> A. No, I don't think I thought that.
>
> Q. Well, whether you realized it then or not you certainly appreciate it now, — don't you, that the kitchen clock was within one minute of sophisticated Bell Canada equipment that timed your call. Within a minute.
>
> A. It could have been that I saw it wrong, too.

And later:

> Q. One of the things that you appeared to make clear yesterday was that insofar as the times that you gave the York officers when they took you step by step through the morning, when you left the detention centre and the shopping at Sears and so on, was the car clock along with the detention centre clock and your kitchen clock. In arriving to pick up Ken Jessop at the dental office, and you told them it was about four o'clock, it was certainly the car clock that you would have used to give you the indication of that time. Is that correct?
>
> A. That's right, but that could have been out, too, for all we know.
>
> Q. That's true.
>
> A. We don't know that, right?

> Q. Of course not. There might have been a considerable number of inaccurate clocks.

The "Citizen's Alert" videotape was then shown to Ms. Jessop. It indicated that her kitchen clock had not been discarded when the show was taped in February 1985. Her testimony on this point, therefore, was incorrect.

At the Inquiry, Ms. Jessop admitted that this clock, in fact, remained in her kitchen until the spring of 1985, when it was removed during renovations and was taken to the back shed. She admitted that it was not removed because it was inaccurate, but rather was replaced by another clock as part of the remodeling. She could not recall whether she advised the Crown or the police of this fact.

Ms. Jessop testified at the Inquiry that her evidence about discarding the clock because it was losing time arose from her own initiative and was not suggested in any way by the police.

She was asked :

> Q. ... [H]ow [do] you think it was that you came up with those aspects of your version, which didn't come from the police, and were not true? Where did it come from, do you think?
>
> A. I think partly it's confusion. We had an awful lot of people around the home at the time, the police were in and out. Your time wasn't your own, you were very put out into the public eye, people were coming to you and saying this, saying that, and I think you just get so confused, because you're trying to grieve, you're trying to get over certain aspects, you push things out of your mind, you're angry. there's just so much going on that — you know, a mistake was made, obviously.
>
> Q. And do you think in the same way as you conceded earlier that one of the reasons why we may have gone from 4:10 to 4:30 to 4:35 was a desire to see someone who you thought to be guilty get off —
>
> A. That's right.
>
> Q. — do you think that factor could have also played a part in the mistake that you've just described in

> saying that the clock had been thrown out when it wasn't, and in saying that it had been thrown out because it had lost time when that wasn't so?
>
> A. Mm-hmm, yes.

Ms. Jessop was advised of a statement made by an individual to a police officer on the Jessop Task Force indicating that she observed Ms. Jean Patkau (a woman with whom Janet Jessop had ongoing contact with during the spring of 1986) with a clock in her possession which Ms. Patkau indicated was "from the Jessops" and one which "the police would be interested in." Ms. Jessop testified that the kitchen clock might have made its way from the Jessop shed to the home of Jean Patkau but she could not say for sure. She denied any discussion with Ms. Patkau as to a police interest in the clock.

According to police notes, Ms. Jessop spent 15½ hours in preparatory meetings with Crown counsel in anticipation of her evidence at the second trial. Mr. McGuigan said that there was a significant amount of material to review since Ms. Jessop already had testified on six occasions.[18] He told the Inquiry that he spent 'two minutes' on the arrival time during this preparation. He was aware of the investigators' view that Ms. Jessop minimized the time her daughter was alone and thought there was 'a ring of truth' to this. He said that he probably knew about the use of the clock as a face-saving gesture as well. He was not aware that her evidence at the stay motion about having discarded the clock was problematic until cross-examination at trial.

Ken Jessop as a Witness

Ken Jessop was not called by the Crown as a witness at either trial. Both Susan MacLean and Leo McGuigan cited his age at the time of his sister's disappearance, his trauma as a result of the murder, and personal problems he had experienced over the years as factors considered in relation to his reliability. The influence his mother may have had on his evidence was also considered. It was Mr. McGuigan's view that it was difficult to predict

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[18] Ms. Jessop testified on six occasions: the preliminary inquiry, the first trial, the stay motion, the application on the admissibility of the screams the night of the funeral, the application on the admissibility of Constable Robertson's evidence, and the second trial.

what Ken might say, and he placed his reliability as lower than that of Mr. May or Mr. X Further, Mr. Jessop was not viewed as a necessary witness given the evidence of his mother, Dr. Taylor and Ms. Lowson.

Ken Jessop was, however, called by the defence at the stay motion. When Crown attorney Brian Gover met with him prior to his evidence, he thought Ken was "a very rattled young man." I should point out that this meeting took place four months after Ken's revelations to Mr. Scott about his and his friends' sexual encounters with Christine.

In the course of cross-examination, Ken was asked by Mr. Gover whether any police officer or Crown attorney had pressured him to change the time of his arrival. He answered "no." Mr. Gover told the Inquiry that this accorded with his own view from his meeting with Ken.

At the second trial, Mr. Jessop testified in examination-in-chief by the defence that he told the police on October 4, 1984, that he arrived home at 4:30 p.m. and that he had looked at his watch.

In cross-examination by Mr. McGuigan, Mr. Jessop was not asked the time of his arrival home. Nor was he asked what he had previously told the police, a question which, in Mr. McGuigan's opinion was more appropriately asked by defence counsel. The appropriateness of the following leading cross-examination by Mr. McGuigan was queried on the basis of Mr. McGuigan's view as to Mr. Jessop's reliability":

> Q. Now you have been asked about this 4:10 time. Would it be fair to say that in relation to the time you got home, over this entire tragedy that there has been some confusion as to when you and your mother arrived home from the dentist's?
>
> A. Yes
>
> .....
>
> Q. Do you know what time it was that your appointment was for?
>
> A. I would have to look at the statement.
>
> Q. If I were to suggest to you it was 3:30, does that sound reasonable?

A. It could, yes.

Q. And when you got there, were there any forms? Did you have to fill out any forms?

A. I believe I had to fill out a new patient information form.

Q. All right. And the receptionist would be there and you would fill that out and give it back to her?

A. Yes.

Q. Is that what happened?

A. I believe so.

Q. And then at some time you went in to see Dr. Taylor and do you recall what he did for you in the nature of dentistry?

A. I believe it was just a basic check up.

Q. [A]fter that was completed, can you estimate how long that would take?

A. I don't know. It has been a while since I've been to the dentist. Fifteen minutes, maybe ... Ten or fifteen minutes, maybe.

.....

Q. Now when you went to your appointment and I asked you, or suggested to you it was 3:30, do you recall if you were early, late or on time?

A. I believe I was late.

Q. And do you know, approximately again, how much?

A. Not that I can recall right now, no.

Q. Could it have been around 10 minutes?

A. It could have been.

Q. So, if we start with 3:40 that you arrived there, you had to go in and introduce yourself, I take it, to the receptionist. And then you got the form and you had to fill that out. How long do you think that took?

A. Probably about 10 or 15 minutes.

Q. And then you went into the dentist's and you were in there, I think you said, 10 or 15 minutes, and then you came back out and you waited another ten minutes.

[objection by defence to leading questions, court does not intervene]

Q. If we started at 3:40 and 10 minutes for the card, fill out the card: is that fair?

A. Yes.

Q. And another 15 minutes for the dentist?

A. Yes.

Q. And you waited about 10 minutes for your mother?

A. Roughly, yes.

Q. Roughly. I have that as 4:15 according to my math. If that is the events that occurred, would you agree with me that you and your mother couldn't have driven from Newmarket to Queensville and been home at 4:10?

A. No.

Q. That wasn't a very tough question, I guess?

A. No.

In his evidence before the Commission, Ken Jessop asserted that the statement that his watch was inaccurate was made as a result of a suggestion made in a preparatory interview with the Crown and that, in fact, his watch was accurate. He had told the police, around the time of the first trial, that his watch, which was new, was, indeed, accurate and that the only difficulty he had using was with the calculator function. Mr. Jessop said that someone suggested to him, during this preparatory interview, that if he had trouble with the calculator component he may also have had difficulty with the time-

keeping function. He agreed with this suggestion, he said, "because I had no way to account for the difference between my October 4th statement and what I was testifying to."

Mr. McGuigan denied that such a suggestion was ever made to Ken Jessop during the course of an interview. (Nor did he elicit such information in cross-examination.)[19]

When Ken was questioned by defence counsel at Mr. Morin's second trial, the following exchange took place:

> Q. If you looked at your watch, sir, and it was true that it was 4:10, and if you told the police as you told us you did, that it was 4:10 when you got home, and if it is true that there has been no pressure from the police and the Crown to change your times, what has caused you to change your time of arrival home before this jury today?
>
> A. *I did not change my time of arrival. I agreed it was possible that it could have been later.*
>
> Q. Sir, it (sic) it's true that you looked at your watch and it was 4:10, and if you told the police on October the 4th and October 6th that you came home at 4:10, why would you say anything about it possibly being later to this jury today?
>
> A. Because it's possible. I was never good with times. That's well documented.
>
> Q. You did tell the police, sir, on October the 6th that you looked at your watch, and it was 4:10.

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[19] Mr. Jessop testified that Mr. Smith, Mr. McGuigan, Sgt. Chapman and his spouse were present at this interview. He did not recall his lawyer being present for these meetings although he did recall his lawyer attending for his trial evidence. Mr. McGuigan testified that at all times his lawyer was present. A letter from Mr. Jessop's lawyer (Exhibit 301) stated that he and Ken Jessop met with Mr. McGuigan on May 15, 1992 in Brampton and on April 2, 1992 in London and that no one attempted to improperly influence Mr. Jessop. Sergeant Chapman's notebook records a meeting in London on May 19, 1992 for 3 1/4 hours between "Leo McGuigan, Joe Kappy and student, Ken and Debbie Jessop." Mr. Smith testified he was not present.

> A. Mm-hmm, I also remembered that day I had a lot of trouble setting the watch.
>
> Q. I'm sorry?
>
> A. *I had a lot of trouble setting the watch.*
>
> Q. You've never before this moment, sir, told anyone, the police, the Crown or anyone else, I suggested to you, that you had any trouble setting that watch.
>
> A. I told my mother, and she knew because she was there. (Emphasis added.)

At the Inquiry, Ken Jessop admitted that he lied when he stated that it was possible his time of arrival was later, that he had trouble setting his watch, and that he told his mother he had trouble setting his watch. (It is interesting that Ms. Jessop told Commission counsel earlier that Ken *did* have trouble with his watch back in October, 1984.) He also said that his evidence during the second trial, asserting that no police officer or Crown attorney had put pressure on him to change his time, was false. He justified the discrepancy between his evidence then and that given at the Inquiry in the following way:

> A. It wasn't true. We thought we were — we were told we were wrong and we were pressured to change our times, and it felt like pressure being put on us and when you're going to testify against — this wasn't, you know, a person anymore — a devil, demon, that the police had built him up to be, that he'd killed your sister.
>
> And lack of judgment takes over and I wasn't going to go in front of the jury and say that the police forced me to change the time because then we might lose the case and this thing that the police had built up to be, this killer, multiple — possible multiple killer would have been back out on the streets.

He told Mr. Morin's counsel that he was 'playing the game':

> Q. Were you telling the Crowns, Mr. Gover, Mr. McGuigan, Mr. Smith, whilst you may have been telling some ... lies in court, were you telling the Crowns the truth out of court, or were you playing the

> game that you knew was expected of you by the police, perhaps?
>
> A. I believe I was playing — for the most part, playing the game. I wish I never had of.

He also said that no Crown attorney or police officer ever expressed any concerns to him about the change in his evidence on the issue of timing.

When Mr. Jessop was asked his opinion as to whether the police and the Crown attorneys knew his evidence was false, he responded:

> A. I can't say for certain, but they would had to have known because I stood by the 4:10 as long as I could.
>
> .....
>
> Q. What about the Crown, sir, at the second trial. From your conversations with them prior to testifying before the jury at the second trial, is it your opinion that they knew that what you were saying, or some of the things that you were saying to the jury, were not true?
>
> A. They would have had to have known.

Findings

In Janet and Ken Jessop's earliest account of events, they indicated several times that they arrived home at 4:10 p.m. Janet Jessop drew support from the kitchen clock for this view. At the second trial, Janet Jessop testified for the prosecution and indicated that she and Ken came home at 4:30 to 4:35 or even later. Ken Jessop was called by the defence. On cross-examination, Mr. McGuigan, through extrapolation, elicited from Ken Jessop testimony that supported, though less firmly, the later time home. Then, at this Inquiry, Janet Jessop and Ken Jessop firmly maintained that they got home at 4:10. Ken Jessop stated that he lied at the second trial. Ms. Jessop's evidence as to her state of mind is less clear.

The issue at this Inquiry is not: 'When did the Jessops arrive home?' Simply put, I do not know. There is evidence that supports any one of a number of times, from 4:10 p.m. to 4:35 p.m. One can construct very impressive submissions favouring several different times. But that is not the

real issue here. The real issue is: 'How did it come about that the Jessops' evidence or proposed evidence came to change in the way it did?'

The March 6, 1985 interview was flawed in a number of respects. First, the officers told the Jessops that their earlier times were wrong — they were impossible. They should not have done so, whatever their own views.

Second, they suggested to Janet Jessop that her kitchen clock could have been slow, when they did not believe this is to be so. (I was told that this was intended to provide Ms. Jessop with a 'face-saving' way to change her times.) They should not have made this suggestion, believing it to be untrue. Ms. Jessop not only came to adopt this suggestion as truth, but came to later add that the faulty clock was thrown out for that reason. This, too, was incorrect, as Ms. Jessop herself now admits.

Third, the whole interview process was calculated to persuade Ken and Janet Jessop that their earlier times were wrong and to modify those times. The investigators genuinely believed that to be true, and they may have been right. Nonetheless, it was inappropriate to conduct the interview in this way. The risk is that the evidence collected becomes, as I say elsewhere, a self-fulfilling prophecy.

Fourth, the officers lacked any insight into their effect upon witnesses. Shephard noted that Ms. Jessop had the perfect right to say that her clock was not slow and 'I'm sorry, I got home at 4:10 p.m.' That is true. However, witnesses, particularly the victim's family, are heavily inclined to believe that the officers' opinions are correct, their own contrary recollections are faulty and that maintenance of their own recollections may imperil the investigation. The officers did not discourage that kind of thinking in this case. Indeed, I find it likely that at least one of the investigators did later refer to Guy Paul Morin as "Moron" in dealings with the Jessops; in any event, it is clear that the officers strongly expressed their views on his guilt to the Jessops, which fed into the Jessops' motivation to assist the prosecution.

Fifth, the officers failed to preserve any detailed notes of this lengthy meeting at which the Jessops' evidence changed. Their notebooks contain nothing substantive. Fitzpatrick stated that foolscap interview notes were discarded. The supplementary report contains, in summary fashion, what is alleged to be the Jessops' evidence. It is also inaccurate. The Jessops did not "originally state" 4:20 p.m. The supplementary report also reflects that Ms.

Jessop said that the 'slow clock' "could be a possibility as they are having problems with the electric clock." There is no reflection that this theory was discounted by the officers themselves, but merely put forward to give Ms. Jessop a way out. (In fairness, the supplementary report does reflect that it was the officers' suggestion that the clock was slow.) Most significant, the telephone calls that Ms. Jessop made that very afternoon raise doubts as to how firmly the Jessops communicated their views that day to the officers as to the new times. On the telephone, Ms. Jessop indicated that York Regional Police had followed her and had the correct times. It is unclear to me whether the Jessops had unequivocally adopted (by the end of this interview) the later times. If they had not (as suggested by Ms. Jessop's reservations expressed on the telephone), the supplementary report was further flawed. This, of course, highlights the problem with the record kept of the interview.

Sixth, the officers failed to properly brief themselves for this interview, in the least, by reviewing *all* of the available materials relating to the Jessops' timing. The evidence at this Inquiry made it clear that they had not adequately done so.

At the second trial, Ken and Janet Jessop testified that they were not pressured by the officers to change their times. At the Inquiry, Janet Jessop spoke of "pressure," with some qualification, but not "bullying." No doubt, Janet and Ken Jessop were not prepared to say anything at the second trial that might adversely affect the prosecution's case. Inspector Shephard denied that the officers pressured the Jessops to change their times, but could appreciate the Jessops' perception, in hindsight, that they had been pressured.

Once Guy Paul Morin was charged, Janet and Ken Jessop were fully satisfied of Guy Paul Morin's guilt. Ken Jessop is convinced that the officers 'poisoned' his attitude towards Morin and his family. Earlier, I found that the officers did communicate their strongly held views to the Jessops as to Mr. Morin's guilt. Given what we know about interviews conducted with other witnesses, one or both of the officers did say other things which contributed to the Jessops' perception of Guy Paul Morin. I also believe that the Jessops were not reticent about contributing to this kind of dialogue themselves. This was understandable, given their situation. I find that the officers' approach lacked a certain professionalism and potentially heightened the unreliability of evidence emanating from the Jessops. In this instance, unlike the officers' dealings with other witnesses, this is explained, in part, by the bonding between the investigators and the victim's family. For example, Detective

Fitzpatrick demonstrated compassion in dealing with the Jessops, which extended beyond the trial's completion.

At the stay motion, Janet Jessop testified that the clock had been thrown out because it was not keeping proper time. She repeated this evidence before the jury. When confronted with the facts which undermined her position, she volunteered that she may have read the clock wrong or the car clock may have been wrong as well. As I have said, Ms. Jessop's testimony that the clock had been thrown out was incorrect. I find (as she concedes) that this aspect of her testimony was not suggested to her by the police but was, instead, initiated by her. Though she attributed this inaccuracy to "confusion," she also conceded that her strong desire to see that Morin not 'get off' may have factored into this inaccurate evidence.

Mr. McGuigan called Janet Jessop at a witness before the jury at the second trial. She had already given this explanation about the slow clock being discarded during the stay motion. Before he called Janet Jessop, Mr. McGuigan may have known that the officers saw the clock as a 'face-saving' gesture only and that her story about the slow clock being discarded was untrue. He certainly knew after Mr. Pinkofsky had cross-examined her. As well, Mr. Gover indicated that there was a general feeling among prosecutors that Ms. Jessop was capable of saying anything, if she thought it would further the prosecution. Objectively viewed, it is difficult to see how Mr. McGuigan could decide that Ken Jessop was an unreliable witness and Ms. Jessop was not.

Mr. McGuigan testified that the reason why he chose not to call Ken Jessop was that he was an unreliable witness, and was a more vulnerable witness. Ken Jessop had been traumatized by the murder. As well, his age was a consideration. His evidence was also not needed, given the evidence of Ms. Jessop, Dr. Taylor and Ms. Lowson. However, in this context, Ken Jessop was regarded as 'unreliable' because he was less likely to unequivocally support the 4:30 to 4:35 arrival time home (which Mr. McGuigan genuinely accepted), and not because Mr. McGuigan was exercising any discretion, out of fairness to the accused, not to call unreliable evidence.

I find that Mr. McGuigan did believe wholeheartedly that the core evidence that Janet Jessop was giving was true — namely, that she and Ken arrived home at 4:30 to 4:35 or thereafter. He believed, and reasonably so,

that the evidence of Dr. Taylor and Ms. Lowson supported that position. He also believed, and reasonably so, that Mr. Pinkofsky had exposed the falsity of Ms. Jessop's evidence that the clock had been thrown out because it was slow. He thought this would have been obvious to anybody — and in that respect he may have been right. However, given the fact that he knew that her evidence, in this respect, was false, he was obligated to do two things: first, advise the jury that her evidence was, in that respect, false and that the Crown placed no reliance upon it. His failure to do this probably did not contribute to the wrongful conviction since the falsity of this aspect was obvious; second, he should have re-evaluated, with some true introspection, the extent to which, if at all, the Crown should seek to place any reliance upon her evidence in light of what was known about Ms. Jessop's reliability generally, what Mr. McGuigan knew about the clock, and, as I will later outline, what she had said about the funeral screams. His judgment was clouded by his firm view that her core evidence was true and by his view that it was the jury's function to assess credibility. Those facts did not change his responsibility.

Janet Jessop spent a considerable period of time with the prosecutors in preparation for her testimony. I am unable to find that anything improper occurred in those preparatory meetings. It is true that Janet Jessop's funeral scream evidence 'developed' through time. I do not attribute this development to any prosecutor. I also do not attribute this development to any officer, though, again, the officers may have failed to ensure that the interviewing process resulted in her best and most accurate recollection. I will return to the funeral scream evidence later in this chapter.

Ken Jessop obviously feels manipulated by the process and troubled by his involvement in Guy Paul Morin's trial. He feels that his evidence was shaped by the authorities and that they led him to contribute to Guy Paul Morin's conviction. These perceptions are truly felt by him. I believe that he gave his testimony before the Inquiry in a genuine attempt to assist me. I have found that officers did conduct a flawed interview with Janet and Ken Jessop on March 6, 1984. I have found that they contributed to the Jessops' continuing belief in Guy Paul Morin's guilt through their discussions with the Jessops. Inspector Shephard now appreciates how the officers' approach could make the Jessops feel pressured. Having made those findings, I find nothing untoward in the prosecutors' personal dealings with him. I find that the prosecutors did not suggest to him that he could say that his watch was inaccurate. There is no evidence that investigators did this at any other time.

Finally, I accept that Janet and Ken Jessop believed when they initially spoke to the police that they had arrived home at 4:10 (and that Janet Jessop was not lying about that time out of guilt over the late return home.) I also accept that Janet and Ken Jessop genuinely now believe that they did return home at 4:10. As I have said, I also accept that Inspector Shephard and Detective Fitzpatrick believed, when they came to speak to the Jessops on March 6, 1985, that the Jessops could not have returned home by 4:10 and must have returned sometime later. They continued to believe that through to the conclusion of the second trial and to the present day. I also accept that John Scott, Leo McGuigan, Alex Smith and Susan MacLean all genuinely believed from their earliest exposure to the case that the Jessops could not have returned home by 4:10 p.m. and must have returned home sometime later.

(x) Profiling

The Request for a Profile

Criminal profiling involves the analysis of the details of a crime and the interpretation of clues left at a crime scene, in conjunction with an understanding of cases of a similar nature, for the purpose of preparing a psychological profile of the killer. It is an investigative tool which is used as a guide to assist police in directing their investigation. In January 1985, profiling was relatively new in Canada.

The Durham Regional Police Service considered utilizing a psychological profile to provide them with an indication of the type of person who would commit the murder of Christine Jessop. As Detective Fitzpatrick had not previously used the services of a profiler, he asked the Metropolitan Toronto Police Force what was needed to obtain a psychological profile from the F.B.I. in the United States. He was given material used in an unrelated case to assist him in formatting his request.

On February 15, 1985, and over the course of the next month, Detective Fitzpatrick and Inspector Shephard made several notebook entries about 'profiling.' Fitzpatrick explained that he and his partner spent over 20 hours putting together the documentation required by the F.B.I.'s Behavioral Science Unit for its preparation of a profile. Inspector Shephard characterized this material as relating to background on the Jessop family, the

circumstances surrounding Christine Jessop's disappearance, the pathology report and selected photographs taken at the body site. It is unclear whether a copy of this substantial package was kept by Durham.

On March 22, 1985, Detective Fitzpatrick delivered this material to Oliver Zink, an F.B.I. agent in Buffalo, in upstate New York. Mr. Zink was to determine the feasibility of profiling this case based on the material provided. A few days later, however, before hearing back from Mr. Zink, the investigators learned that F.B.I. profiler John Douglas was in Toronto on an unrelated matter. Mr. Douglas was an agent from the National Centre of the Analysis of Violent Crimes located at the F.B.I. Academy's Behavioral Science Unit in Quantico, Virginia.[20] The investigators contacted Mr. Douglas and arranged a meeting with him to discuss a possible profile.

The Integrity of the Profile

Guy Paul Morin was a suspect at the time the investigators discussed this matter with the F.B.I.. An issue arises as to whether the profiling process was corrupted or contaminated during the exchange of information between the detectives and the profiler.

Both Fitzpatrick and Shephard understood that the F.B.I. would not prepare a profile if a suspect had been identified. While Inspector Shephard testified that he did not know the underlying reason for this policy, he assumed it was simply considered a waste of time to prepare a profile when the police already had a viable suspect. He added that while Guy Paul Morin was a suspect, a profile was nevertheless requested "in case it led us somewhere else." At this Inquiry, Shephard was asked this:

> Q. You know that the F.B.I. has a policy ... not to do a profile where there's a suspect in mind. You have a suspect in mind, but you're causing the F.B.I. to do a

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[20] Commission counsel, and several parties to the Inquiry, wanted Mr. Douglas to be called as a witness. Commission counsel and staff spoke with Mr. Douglas' representative several times. By letter dated June 18, 1997, Mr. Sandler renewed the Commission's request that Mr. Douglas attend as a witness. (See *Letter dated June 18, 1997, Appendix P*) As reflected in that letter, the summons issued by the Commission to Mr. Douglas could not be enforced in the United States. Though Mr. Douglas never specifically declined to testify here, there was no response to the requests for attendance made orally and in writing.

> profile. I mean surely it dawned on you that the reason for the policy was that the officers, either consciously or unconsciously, could communicate information to John Douglas that would cause him to be pointed in the direction of your suspect, rather than enable him to do an untainted independent analysis ...
>
> A. That thought never entered my mind sir.

Inspector Brown said that he instructed Detective Fitzpatrick and Inspector Shephard to reveal nothing to Mr. Douglas about Guy Paul Morin's status as a suspect, to ensure the independence of the report. He said:

> We were scrupulous in not even hinting that Mr. Morin was a suspect in this case to Mr. Douglas [because] obviously Mr. Douglas can't be objective about a profile if he already knows who the suspect is.

On the afternoon of March 26, 1985, Fitzpatrick and Shephard introduced Douglas to the Jessops at their home. The investigators maintain that the Jessops were unaware that the police had a suspect. Following this interview, the three men (Fitzpatrick, Shephard and Douglas) travelled to the body site via Ravenshoe Road. Later that evening, the officers presented Douglas with photographs, police reports, medical examiner's reports, and autopsy information for his review. The officers and Mr. Douglas parted company shortly after 10:00 p.m. A supplementary report prepared by Inspector Shephard states:

> March 26th, 1985 ... Douglas ... was spoken to and questioned by us with regards to possible person(s) who would commit this type of crime.
>
> Douglas also viewed exhibits and photos and advised that he would try and give us a brief summary of suspect(s).
>
> Douglas also advised that when he returns to Quantico he would be able to supply us with a more detailed profile.
>
> Note: Douglas to put brief profile on tape.

The next afternoon, Detective Fitzpatrick and Inspector Shephard again met with Douglas. Shephard's notebook entry for this date reads as

follows:

> Met with John Douglas re Profile, viewed Citizen's Alert tape on Guy Paul interview. discuss Proactive techniques. 20:00 off duty.

Inspector Shephard said that Mr. Douglas was told on that day that the police had a suspect; *he did not react to this information with surprise*. The tape of the February 22, 1985 interview with Morin was played for Douglas. Both detectives denied that any discussion or information relating to Mr. Morin was exchanged *before* Mr. Douglas provided them with his taped cassette containing the profile that he had dictated earlier. Brian Gover recalled as follows:

> Q. [F]rom your contact with the police officers on the case, and your knowledge of what Douglas expected, was there a suspect that Fitzpatrick and Shephard had in mind at the time they retained Douglas to do the profile?
>
> A. Yes. They had Mr. Morin in mind at the time. And as I recall Staff Sergeant Fitzpatrick telling me, and I don't believe it was a private conversation, I think other police officers and/or Crown counsel were present. In the course of his dealings with the Durham police, Mr. Douglas confronted them and said to them, "Well, you have a suspect in mind don't you?" That, Mr. Douglas had determined on his own, given the information that he was being provided by the investigators, that in fact they were breaching the protocol used by profiling experts.
>
> Q. So Fitzpatrick told you that Mr. Douglas had confronted him with what Mr. Douglas deduced from the way Durham Regional police were dealing with him?
>
> A. Yes.
>
> Q. In effect that they did have a suspect and that would be in breech (sic) of the protocol?
>
> A. That's right.
>
> Q. And the result is, in your opinion, the profile that

> was constructed of the potential killer by Mr. Douglas was contaminated in that way?
>
> A. That's right. Essentially, in my view, it was rendered valueless.

Portions of the Douglas profile are set out below:

> On October 3rd. 1984 when the victim left school she was very anxious to come home and show her parents and family a new musical instrument, a flute, that she obtained that day and like many children of her age she would probably want to show someone her new toy, perhaps even play the instrument to someone. Upon arriving home she came to her residence and noted that her mother had taken her older brother to a dentist and would not be home until perhaps 45 minutes to an hour from the time she arrived home. It is the opinion of this profiler that the victim, Christine Jessop, in all probability left her residence and went with someone who she knew or *went to the residence of an immediate neighbour's to show them her new toy.* The Durham investigation indicates that the victim after arriving home from school got on her bicycle, traveled to a variety store where she purchased some candy, then returned to her residence, parked her bicycle indoors at the rear of the residence, at some point took her flute with her and left her residence. In summary, the victim Christine Jessop was targeted by a subject whom she recognized and knew and she became a victim of this violent crime because the subject responsible knew that this young child could be easily dominated, manipulated, and physically controlled by him quite easily. (Emphasis added.)

Counsel for the Morins alleged that the investigators shared their theory with Mr. Douglas that Christine Jessop sought out Mr. Morin to show him her new recorder; that is why the profile echoed this theory which had been developed weeks earlier by Shephard and Fitzpatrick. Inspector Brown responded that sometimes a profile is so "startlingly accurate," one would almost have to come to a conclusion that, perhaps, it was not prepared independently even though, in fact, it was. Inspector Shephard testified that their theory was not communicated to Mr. Douglas:

> We never led him to believe anything. We just

> explained to him the circumstances. He read some reports ...

Inspector Shephard said that after Mr. Douglas listened to the taped interview of Mr. Morin, he agreed that he sounded like a good suspect and discussed with them pro-active interviewing techniques (discussed later).

In an article appearing in *The Globe and Mail* on November 6, 1985, Mr. Douglas was reported as saying that he had no idea that the profile, which described the killer as a loner who lived in the neighbourhood, would prompt the police to head out and arrest Mr. Morin. He was quoted as follows:

> Inexperienced investigators may get the preconceived idea, then get the profile, and lock on to somebody. The analysis is experiential, it's not scientific.

Inspector Shephard's notebook reflects that on March 28, 1985, at 7:45 a.m., he left the taped cassette containing the profile at his office for transcription. Detective Fitzpatrick's understanding was that the transcribed document was subsequently forwarded to Mr. Douglas, together with the material that was originally sent to Mr. Zink for his review, but no additional profile was provided to the officers.

The preface of the profile written by Mr. Douglas contains the following passage:

> This profile is based upon the viewing of the initial crime scene, photographs and police reports, viewing the Medical Examiner's reports, reviewing the background history of the victim, doing a neighbourhood analysis and profile as to where the victim resided as well as an analysis of the disposal area where the victim was subsequently deposited by the unknown suspect as well as autopsy protocol and reading the autopsy itself. *There was no information provided to the Profiler as to whether or not there had been any suspects developed by the investigators in this case.* (Emphasis added.)

The Profile as an Investigative Tool

The F.B.I. profile listed a number of personal characteristics,

propensities and interpersonal difficulties which were associated with the person responsible for the murder of Christine Jessop. The following are some of the characteristics which, in the opinion of Mr. Douglas, were associated with the murderer:

- The victim sought out someone she knew and trusted to show him the recorder she had received that day;
- The offender was youthful — late teens, early twenties;
- He was having personal problems at home, school or work and was experiencing many life stresses and may have had difficulties with a girlfriend at the time of the offence;
- Not antisocial, but somewhat of a loner who prefers his own company;
- May present a façade as a macho individual, superior to others, but has poor self-esteem and lacks self-confidence;
- Tends to play with children who might be impressed by his antics;
- Drives older model vehicle, not well-maintained and cruises area in vehicle — spends time cruising in his car as a vehicle for convenience to escape;
- Has a poor self-image and may have a physical ailment, disability or disfigurement or facial scars and does not maintain good personal hygiene, is not well-groomed, needs a haircut or shave, wears sloppy, soiled clothing in need of repair;
- Occasionally drinks alcohol;
- Will have a criminal history of nuisance, arson, cruelty to animals, voyeurism, or break and entering;

- Lazy, not a high-achiever, of average intelligence, a mediocre student; offenders of this type generally do not graduate from high school, but if he did he would have gotten by with barely passing grades;

The following post-offence behaviour was indicated:

- May have cleaned the car's interior after the offence;
- Rigid, stiff, pre-occupied or nervous with the police;
- Overly cooperative, participated in searches which show how concerned he is;
- Has difficulty sleeping.

A number of these points could not relate to Guy Paul Morin in any way. By way of example only, he had no history of criminality, he was not lazy, did not have a poor self-image, physical ailment, disability or disfigurement. There was no evidence that he was a 'cruiser.' There was no evidence that his vehicle was cleaned after the offence was committed; to the contrary. He was not rigid, stiff, pre-occupied or nervous with the police; to the contrary. He did not demonstrate an overly cooperative attitude by participating in the search (ironically, despite this aspect of the profile, his failure to search was later used to demonstrate consciousness of guilt). There was no evidence he had experienced a number of 'failings' in his life, that his parents were after him to find a job, that he was experiencing difficulties with a girlfriend at the time of the offence or that his parents were experiencing marital difficulties. There was no evidence that he dated girls younger than himself whom he could easily dominate. In summary, it could not reasonably be said that the profile matched or even closely resembled Guy Paul Morin.

Inspector Shephard admitted that he and Fitzpatrick probably focused on the features of the profile which fit Mr. Morin and ignored those which did not: "Obviously, if they didn't fit him, then it was of no value to us, but it was ... only a guide that we used anyway."

When asked what it would have taken for the profile to have pointed away from Mr. Morin, Inspector Shephard responded: "*If they said a female*

was responsible ... probably we would have looked in the other direction."

The Dissemination of a Modified Profile

Mr. Douglas recommended that the profile be used to create pressure on the perpetrator of the crime by telling the media in a series of interviews that investigative techniques (*e.g.* personality profiling and advances in forensic sciences) were providing new leads which would ultimately identify the killer. He suggested that certain portions of the profile be released to the media:

> This would be to the effect that the subject knew the victim, the subjects age grouping, the subjects vehicle he drives, the type of vehicle, the post-offence behaviour exhibited by the subject that should be recognized by people in the community who may have recognized the subject, his behaviour immediately following the homicide and you are looking for them to come forth and provide information to you.

Mr. Douglas also recommended that the suspect should be interviewed only when it appeared he had been affected by the press releases and the pressure brought to bear by the investigation. He also made other suggestions on how to interview a suspect. He recommended, for instance, that a blow-up of a fingerprint, supposedly taken from the victim or her possessions, be displayed prominently in the interview room, and that the suspect be told that the print matched him. He further suggested that filing cabinets, with the suspect's name clearly written on the outside, be placed in the room. In this manner, pressure would be brought to bear upon him, hopefully inducing a confession. These suggestions were used during the interrogation of Mr. Morin following his arrest and will be discussed more fully below.

Mr. Douglas' recommendations were set in motion through a press release dated April 9, 1985, announcing that the police had retained the F.B.I. for the purpose of preparing a profile of the murderer of Christine Jessop. The communiqué said that the officers had been advised by the F.B.I. that "the Jessop case is one that can easily be profiled ... everything points towards someone in Queensville." The profile, police said, would be available the following week.

A second press release dated April 17, 1985, contained a *modified* profile from the one provided by Douglas. Characteristics which corresponded to Mr. Morin (or which the police thought corresponded) were released to the press; those which did not were excluded or amended to conform. For example, the age group of the perpetrator was extended from "late teens to early 20's" to "nineteen to twenty-six years" [Guy Paul was 25 at the time of the offence]. The offender was described as an intelligent individual with a high school education, features Inspector Shephard agreed were reflections of what he knew about Mr. Morin rather than what was contained in the profile. The press release[21] said this:

> Police released some details of an F.B.I. report that gives a psychological portrait of Jessop's killer. According to the findings of F.B.I. agent John Douglas, the killer is white, between 19 and 26 years old, has a high school education and is intelligent, he's a night person, dresses sloppily and feels superior to others. The F.B.I. believes the man is a labourer, lives in Queensville, and knew and had the trust of Christine. *It's believed he was sane and did not intend to commit murder, but lost control after sexually assaulting the girl.* Police say they have less than 5 suspects in the case and are watching all closely. (Emphasis added.)

The reference to 'he did not intend to commit murder' was a 'face-saving scenario,' advocated by Douglas to increase the likelihood of a later confession.

When arrested on April 22, 1985, Guy Paul Morin told the police that, on hearing the profile on television, his father told him that it sounded like him. Morin, of course, denied his involvement. Mr. McGuigan commented during the Inquiry that he found it strange that Mr. Morin's own father,

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[21] The modified information reported in the press release corresponded in a large measure to information contained in a supplementary report typed on April 26, 1985 and addressed to the Chief of Police. In that report, Inspector Shephard stated that the profile "has supported our suspicions," *i.e.* that Mr. Morin had murdered Christine Jessop. Shephard was asked why the supplementary report did not indicate that the information provided represented an aspect of the pro-active technique and not the actual profile. He assumed that this was done for security purposes as the police did not have control of all copies of their reports. One copy, for instance, went to central records, where civilians worked.

having expressed this thought, would later come forward with an alibi for his son. His interpretation of the conversation between the father and son was that they were discussing whether Guy Paul Morin had killed Christine Jessop:

> I took it as a — if I can use the phrase, a bit of a domestic between Guy Paul Morin and his father, in which the father's saying: That fits you. And he's saying something along the lines: you know me, I wouldn't do that. I mean why would you ever have that type of discussion with someone that was there, and knows that you were home all that time, and that you couldn't possibly have murdered Christine Jessop? I mean, it may be it's a family quirk that they talk that way, and maybe — I obviously saw that before when I was reading the statement, and it didn't click in as it did when I read it this time.

Mr. McGuigan was unaware that the profile broadcast for public consumption was designed by the police (in the way discussed above) to match Mr. Morin to unnerve him prior to his interview upon arrest. Mr. Morin's perspective on this discussion with his father was that it was a good-natured jovial remark. He told the police on the day of his arrest:

> Like they said on the news last week, [the Morins] said, "Christ, you're the grubby sucker around here. You've always been grubby." I said, "yeah, well that's my way." and age, what nineteen to twenty-five that sounds like me. I said, "there's no reason to think about it dad." Nothing to even think about, me, Christ, I swear this is so crazy.

Inspector Shephard said that no consideration was given to the impact on the fairness of any future trial against Mr. Morin which could arise from the release to the public of an altered profile designed only to match the suspect.

Mr. Morin was arrested on April 22, 1985. Inspector Shephard met with Superintendent Douglas Bullock of the Durham Regional Police Service just prior to the press release announcing the arrest, but he testified that he was not made aware of any strategy on how the profile would be featured in a press conference which was to follow the arrest. In fact, as Mr. Justice Osler noted later in the change of venue application, Superintendent Bullock told

the press that Mr. Morin came well within the profile which had been extensively publicized. This was inaccurate, misleading and unfortunate because this statement later became one of the major considerations which formed the basis for the change of venue application before Mr. Justice Osler. It was Mr. Scott's view that any press conference by the police is not helpful to the Crown because of its potential for prejudice, leading, as it did in this case, to a change of venue application.

In preparing for the first trial, Mr. Scott thought that defence lawyers might attempt to put forward evidence that Guy Paul Morin was not the kind of person who could psychologically commit such a crime. Accordingly, he intended to call Douglas as a witness to rebut that assertion. As it turned out, this was not necessary when the 'insanity evidence' was offered by the defence, a topic which is discussed later in the Report.

On December 23, 1985, Mr. Scott wrote to Assistant Director James McKenzie of the F.B.I.. This is what the letter said, in part:

> Dear Sir:
>
> One of your special agents, John Douglas provided a psychological profile of the killer of a 9 year old girl. His profile turned out to be remarkably accurate.

Mr. Scott believed that when he wrote that letter he had read the actual profile — not just the supplementary report tailored to elicit a particular response. He now believes the "remarkable accura[cy]" portion of his letter was a slight overstatement in order to get McKenzie's help in procuring the attendance of Mr. Douglas in the Canadian courts. I should add that in Mr. Douglas' will-say for the first trial, there is a specific statement that he had no information referable to any particular person in preparing the report.

The Decision Not to Wait

Attached to the profile was a five-page document entitled *Investigative Technique*. This document detailed pro-active techniques relating to the arrest and interview of a subject with a view to obtaining a confession. This is what it suggested, in part:

> [I]f a suspect is developed by your Department the next step would be to assess the subject giving him the benefit of the doubt that he did not perpetrate this crime, however, if the assessment concludes that he more than likely is the subject the next step would be to implement the investigative techniques over a two to three week period followed by the interrogation techniques.

Inspector Shephard could not recall why the investigating officers did not follow Mr. Douglas' advice to observe Mr. Morin's behaviour for signs of disturbance following the press release. The fact that Mr. Morin did not appear affected by the pressure the technique was intended to create did not change their decision to arrest him. Rather, Inspector Shephard explained that efforts to target Mr. Morin in the public domain were conducted to facilitate a future interview with him when he would believe that the police had considerable evidence against him.

Findings

The F.B.I. document entitled *Investigative Technique,* which was provided to the investigators along with Douglas' profile, suggests that "if a profile is developed by your department, the next step would be to assess the subject, giving him the benefit of the doubt that he did not perpetrate the crime." Unfortunately, Morin not only did not get the benefit of the doubt, the investigators looked to the profile for confirmation of their own strongly held views.

I have concerns about the extent to which the profile was contaminated by the investigators' pre-conceived views. This may explain aspects of the profile that do parallel Guy Paul Morin. We do not know precisely what the investigators or the Jessops told John Douglas. However, the wisdom of not conducting a profile once a suspect has been identified is obvious.

Having said that, though features of the profile did parallel Guy Paul Morin, it could not reasonably be said that the profile matched or even closely resembled Guy Paul Morin. This did not cause any introspection on the part of the officers. Indeed, Inspector Shephard was asked what it would have taken for the profile to have pointed away from Guy Paul Morin. His candid, and very significant answer at this Inquiry was that: "if they said a female was

responsible ... probably we would have looked in the other direction."

Once the modified profile was publicly disseminated, the officers did not follow Douglas' advice to observe Morin's behaviour for signs of disturbance. The fact that there was no evidence that he was affected (in any incriminating way) by the press release did not affect their decision to arrest him. Put succinctly, the investigators never did use the profile to help them direct the investigation to the perpetrator, only to help them secure the conviction of Mr. Morin, the man they already thought was the perpetrator.

The use of a modified profile was problematic. Its dissemination was not intended to bring forth new investigative leads from the public; it was intended to 'spook' Guy Paul Morin. The problem with that approach was that, by tailoring the profile to fit Guy Paul Morin, and then publicly disseminating it, the police helped ensure that Morin could never get a fair trial in that region and that people in that community who knew Morin would draw the same parallels. Indeed, it was only at this Inquiry that the nature of the publicly-disseminated profile was revealed. Crown counsel were unaware that the profile had been modified for public release. The supplementary record, for internal use, did not reflect this as well. I am unclear as to the extent to which Crown counsel had the actual profile, rather than the supplementary report or press release.

My recommendations address the proper and improper use of a profile.

(xi) The Arrest — April 22, 1985

On April 22, 1985, at 7:20 p.m., Detective Fitzpatrick and Inspector Shephard parked their police cruiser on the south side of Aurora Sideroad, just west of Highway 48. They knew that Guy Paul Morin would drive by them on his way to his band practice in Stouffville. At 7:45 p.m., as his Honda passed them, they followed and pulled his vehicle over. Mr. Morin got out of his car and walked back to the cruiser. He initially thought that local police were stopping him because he did not have his seatbelt on, and he was surprised to see Inspector Shephard and Detective Fitzpatrick. He asked "What's up guys?," to which one of them replied "Well, I think you know." When Inspector Shephard advised him that he was under arrest for the first degree murder of Christine Jessop, he exclaimed "What! You're kidding, John." He was advised of his right to counsel and he said he understood the

meaning of that right. He reiterated that the detectives were 'kidding.' They assured him they were not.

While Mr. Morin was searched by Detective Fitzpatrick, he saw Inspector Shephard look inside his car. He saw a tow-truck at the scene, but did not know until later that it was there to take his car to the Centre of Forensic Sciences.

Mr. Morin was questioned in the cruiser during the drive to the police station in Whitby. He was again questioned at 18 Division from 8:26 p.m. to 2:05 a.m. As the detectives drove to the station, they attempted, once again, to record the conversation. But on arrival, they discovered that the briefcase recorder had malfunctioned.

Inspector Shephard said that when he learned of the malfunction, he made detailed notes of the conversation in the car consisting of 65 questions and answers. Some of these notes are reproduced here:

> Morin: You really surprise me. You really do. You've made a mistake. You really have. I don't want you to make any mistakes, but you have. I never touched Christine, never.
>
> Shephard: Guy, are you certain that you never touched her? That's a pretty broad statement.
>
> Morin: I know, John. Never. I never touched her. I mean that, I really do.
>
> .....
>
> Morin: Never, I never touched her.
>
> Shephard: Never gave her a hug or a piggy-back ride, just playing with her?
>
> Morin: Never. I never hugged her — never gave her a piggy back ride. I never placed a hand on that girl.
>
> Shephard: Guy I don't mean in a sexual way, I mean just playing with her or just in fun, maybe you picked her up and swung her around.
>
> Morin: John, I never touched her, never placed a hand

on her.

.....

Shephard: We got your hair on Christine, her hair in your car, plus fibres in your car and on her clothing. We also have fingerprints, Guy, and finger prints don't lie.

Morin: Finger prints on what?

Shephard: Guy the OPP Tech support services in Toronto have the latest laser equipment for detecting fingerprints on clothing, skin, leather — and finger prints don't lie.

As Detective Fitzpatrick acknowledged during his evidence, there were no fingerprints connecting Mr. Morin to the murder of Christine Jessop.

Inspector Shephard's ability to record verbatim the entire conversation with Morin in the vehicle was questioned:

Q. Well, you know the tape recorder's not working, so you know that if there's some issue as to what's said in that police cruiser, you're going to rely upon your independent recollection of the events. You're writing them on your evidence, you're writing these pages and pages and pages and pages of entries that take place in the cruiser by way of question and answer, without the benefit of any recording device.

Did you suggest to Officer Fitzpatrick that he should write out his recollection of the questions and answers to assist ultimately if there's some issue as to what was said in the cruiser?

A. Detective Fitzpatrick read my book over and initialed it, sir.

.....

Q. So, that represented his verification of each and every word that was contained in your notebook; is that how you understood those initials?

A. Well, I'm sure that he knew that I didn't have every

> word that was spoken in the cruiser on the way back to Whitby. I'm certain he realized that. He was just -- he read them over and agreed that that was the conversation that took place. I don't know whether he said, yes, that's every word that he said, or that's the general conception of what was said, but he read it over and initialed my notebook.
>
> Q. Well, did you take any rough notes on the way to the station?
>
> A. No, sir, I didn't. I was relying on the tape recorder.
>
> Q. I mean, if I were to ask you, and I'm not going to engage in the exercise to write down now the last sixty-five questions and answers that I've directed to you and your responses; do you think you could do it?
>
> A. I sure couldn't. Not on the pressure I'm under up here, and that's twelve or thirteen years ago. Big difference in age.
>
> Q. Do you think you could have ---?
>
> A. And I have a hard time remembering what happened yesterday, now, without trying to get into an exercise like that.
>
> Q. Okay.
>
> A. Or even suggest that I could do it.

In the course of the interview at 18 Division, Guy Paul Morin produced his penknife, which had not been discovered in the course of the search of his person upon arrest. The penknife was ultimately tendered into evidence at trial as the potential murder weapon. He provided hair, saliva and blood samples to the police upon their request; however, he refused their request for a polygraph examination.

During the course of the questioning, Mr. Morin was told that the case against him was "overwhelming." He also was told that the police believed he needed psychiatric help, and that his parents would be informed of his arrest and their house would be searched.

The interview room to which Mr. Morin was taken contained filing

cabinets bearing Christine Jessop's name, a map of Queensville, a photograph of Christine Jessop, and indications that a fingerprint connected with the crime scene had been positively identified as that of Guy Paul Morin:

> The interview should be conducted in a more of a business-like environment in a room which has low lighting, a room that upon entering the room it appears that this is the headquarters of a task force that has been formed solely for this investigation and as he looks around the room he sees investigative flow charts, file cabinets with his name on a file cabinet along side of a file cabinet with the victim's name. He sees the underwear, clothing belonging to the victim, the flute that belonged to the victim wrapped in clear plastic, evidence envelopes which indicates on these envelopes positive ID, blatant fingerprints developed and these items should be placed off in a corner of a room where the subject will observe these during the interview, these items will not be placed right in front of him at the beginning of the interview, but later on when it appears he is becoming agitated and nervous by them they can be brought closer to him.
>
> .....
>
> The subject would have already been set up for that and he will be more willing to provide a confession at this point when you would expect him to break down and expect him to show remorse and cry although this will not be truly genuine. His tears are not tears for the victim but tears for himself because his life is now ruined. Deep down he has no remorse for this victim. His only remorse is that he is going to have to go to jail.

By the time Guy Paul Morin was put in a cell at the Whitby jail, it was 3:00 a.m., April 23rd. Both Detective Fitzpatrick and Inspector Shephard acknowledged during the Inquiry that short of a rock solid alibi (such as proof that Morin had been incarcerated at the relevant time), there was nothing Mr. Morin could have said to convince them they had arrested the wrong person.

Findings

It is not uncommon in criminal trials for the defence to allege that the

officer's purported verbatim account of a lengthy conversation with the accused is inaccurate or misleading. It is difficult to have confidence in a purportedly verbatim account of a conversation of the length reflected in Inspector Shephard's notes, particularly since he did not anticipate, during the drive to the station, that verbatim notes would be required. However, Shephard did not allege that Mr. Morin incriminated himself during this trip to the station and I am reflecting more upon the systemic issue here than upon any substantive problems with the content of his notes. In other words, the notes may or may not be as accurate as Shephard thinks they are, but they are not intended to be misleading.

(xii) "Shout From the Rooftops"

Throughout the ensuing six-hour interrogation, Mr. Morin proclaimed his innocence and his belief that the police had made a mistake in arresting him. Inspector Shephard expressed his opinion that Mr. Morin's statement was a self-serving proclamation of innocence. He recalled discussions with Crown counsel either prior to the first or second trial in which the same sentiment was expressed. It was his understanding that if the statement was introduced, Mr. Morin might not have given evidence.

The admissibility of Mr. Morin's statement upon his arrest, at the instance of the defence, was the subject of a pre-trial motion before Mr. Justice Donnelly. The defence maintained that the statement supported Guy Paul Morin's alibi: that is, the time he arrived back in Queensville. The Crown's view was that the statement was self-serving and inadmissible, given the Crown's assertion of prior, *not recent*, fabrication in circumstances where there had been an opportunity to fabricate. During the course of this motion, Mr. Pinkofsky conceded that, pursuant to the Ontario Court of Appeal judgment in *R.* v. *Campbell*[22], the general evidentiary rule against the admission of previous consistent statements "precludes an accused from eliciting from witnesses self-serving statements which he has previously made."

After hearing the submissions of counsel on the issue, Mr. Justice Donnelly ruled that Mr. Morin's April 22, 1985 statements could not be introduced by the defence.

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[22] (1977), 38 CCC (2d) 6 (Ont. C.A.).

Had the April 22nd statement been allowed in evidence, the jury would have learned how Mr. Morin had reacted when he was first confronted with the allegation that he sexually assaulted and killed Christine Jessop. Morin had maintained his position that Christine had never been in his Honda in spite of being told by the officers that the evidence proved the opposite. Its relevance to Mr. Morin's alibi is discussed later in this Report.

In cross-examination of Mr. Morin during his second trial, Mr. McGuigan asked him why he had asked Mr. May not to repeat what he was saying to anyone. Mr. Morin replied that his lawyers had told him to avoid speaking about the case:

> A. And since Mr. May was questioning me about my case on and on, I told him, okay, just to you, never mind speaking about it to others and he said he'd do that ...
>
> Q. It was your alibi. I mean, if you have a good alibi you'd want the world to know it, wouldn't you?
>
> A. That was strictly for court matters.

In closing to the jury, McGuigan said this:

> It will be up to you to determine what the accused said at that point, but it is interesting to note that whatever the accused said at that point [to Mr. May in the cell] he said it in a low, subdued voice. Both the Max Allen and RCMP transcripts indicate that he is whispering, and they found at least portions of that conversation inaudible.
>
> Does it make any sense that after Robert May asked him whether he had sex with Christine Jessop, the accused would proclaim his innocence in a low subdued tone? Surely an innocent man in those circumstances would want to shout his innocence from the highest rooftop.
>
> The accused testified before you that he was perturbed by May's blunt and crude manner in posing that question. I submit that if the accused were telling you the truth on that issue, he sure has a strange way of expressing his emotions, and I would ask you to consider how often do you express indignation in a

> quiet subdued voice?
>
> One might also expect rather enlargement on that answer. "What are you talking about? Why do you ask me that question? I told you I'm innocent? Why, why do you ask me did I bury her? Why do you ask me did I have sex with her?" You would say: "What are you talking about?" That's not (sic) just say "no."

Mr. McGuigan said that the Crown's objection to the admissibility of the April 22, 1985 statement was not made to preclude Guy Paul Morin from demonstrating that he did, indeed, 'shout from the rooftops' at the time of his arrest. He saw no connection between the statements to Mr. May and the statement to the police. He said that many criminals deny their activity to police and this should not be an impediment to their prosecution. Mr. McGuigan's opinion was that even if one had witnessed the forceful and repeated denials of Guy Paul Morin at his arrest, it would have had no impact on the argument relating to the interpretation of Morin's demeanour when he was speaking about his innocence with May:

> He denied his involvement in this and that. So I mean, because someone denies it to authorities, doesn't mean it's gospel.

Mr. McGuigan's position was that he relied on the ruling of the Court disallowing the statement as self-serving. Mr. Morin's denial to the police, in Mr. McGuigan's opinion, was not probative in assessing his failure to exclaim his innocence to Mr. May.

Mr. Justice Donnelly, in his charge to the jury said this:

> In this regard you may look for support for what May and [Mr. X] said, in the taped discussions of :
>
> .....
>
> d) the low or whispered response to the inquiry about sexual conduct
>
> ... The Crown submits the accused is not a credible witness. Some demonstrations of which are:
>
> ...

> v) his whispered protestation of innocence, when May inquired about sex during the body tape, is unusual for an innocent man.

The trial Judge also reminded the jury in his charge that Mr. Morin "was cross-examined about why he wouldn't want the whole world to know of his alibi."

Findings

Mr. McGuigan submitted to the jury that an innocent person, questioned about an allegation of 'having sex with Christine Jessop' would want to shout his innocence from the highest rooftop. This, he alleged, undermined Mr. Morin's position that he had asserted his innocence to Mr. May, but done so in a low, subdued voice. In my view, this argument was framed in such a way so as to invite the jury to infer that an innocent person would not only deny guilt, but shout it out, and further elaborate upon it in the most indignant terms. In my view, it became significantly relevant (if not already so) that Morin, when first confronted with the allegation, had arguably 'shouted his innocence from the highest rooftop' and repeatedly elaborated upon it with indignation. Further, the fact that he had done all this 'shouting' and expressed all this indignation to the authorities to no avail, might also explain his more subdued later expressions of innocence. (As I later note, this drawing of inferences, particularly inferences of consciousness of guilt, from emotional demeanour is fraught with danger.)

After Mr. McGuigan's closing address, the defence did not seek to revisit the admissibility of Guy Paul Morin's statement. Even accepting that Mr. McGuigan's closing address may have 'opened the door' to the admissibility of Guy Paul Morin's statement, I see no misconduct here. The systemic issues arising out of the use, if any, to be made of an accused's exculpatory statement upon arrest are later addressed.

My recommendations address this issue.

(xiii) The Search of the Morin Residence

Two and a half hours after Guy Paul Morin's arrest, police, armed with a search warrant, attended the Morin residence and, for 12 hours,

searched both inside and outside the house. Officers had been provided with a list of articles for which they were to search: a knife, buttons missing from Christine's blouse, a blue woollen sweater that belonged to Christine, shirts or jackets with blood stains, a gold-coloured seat cover, a coat or collar with animal hair, anything related to sex, and anything else that may appear to be related to the case. Twelve officers worked in three teams.

Sergeant Michalowsky, one of the three identification officers at the scene, searched the rear yard of the Morin residence and seized a number of blankets and clothing that he thought may be related to the fibres found on Christine's body. Constable Harry Shephard and his team searched rooms on the first floor. Constable Robinet and his team searched the upstairs bedroom. The house was later described as very disorganized. In all, 81 items were seized from the upstairs bedrooms, including clothing, buttons, scissors, newspaper clippings and footwear. Robinet took tapings from a red flannel sleeping bag found in the north bedroom and from various blankets and carpets found in the Morin home. He also gathered hair samples from one of the Morin dogs. At 2:20 a.m. that morning, he attended the Jessop property in order to obtain a hair sample from the Jessop dog. At 6:40 a.m., he taped samples from yet another part of the Morin home.

It did not occur to Robinet at the time that it was an unwise practice to interrupt the search at the Morin residence to do something at the Jessop home and then to return to the Morins. At the Inquiry, he acknowledged that he saw the potential for contamination.

Guy Paul Morin later testified that, at the time of his arrest, the house was in a state of disarray because of the ongoing renovations. Ida Morin testified that, while her house was clean, it was not always as tidy as she would have liked it to be, in part, again, because of renovations.

According to Alphonse Morin, the house "was in one mess" after the police searched it on April 22, 1985. Items were strewn on the bed, including some of Mr. Morin's time cards. Grocery receipts were not in the bag in which Mr. Morin traditionally kept them, but were all over the floor. He said during the trial that he was given no explanation as to why such items were strewn around the premises. Ida Morin noticed papers, photographs and receipts scattered all over the floor in Guy Paul's room. Constable Robinet testified that the house was left by the police in a better condition than when they arrived. While the Morins agreed, as set out above, that the house was

something of a mess, they disagreed with Robinet's contention.

(xiv) The Mileage Sheets

Mr. Morin testified that at the time of his arrest, slips of paper recording gas purchases would have been in the car. The records consisted of handwritten notations of gas purchases including the date and kilometre reading at the time of purchase. The records were dated from March 23, 1981 to November 1, 1984.

In his tape-recorded conversation with Mr. May on July 1, 1985, Mr Morin considered whether he bought gas after stopping at Mr. Grocer's on October 3, 1984. He told May that all the gas receipts and gas mileage notations were in the car from the time it was new and that if he did make a gas purchase on October 3, 1984, it would be documented in those records.

On July 22, 1985 Detective Fitzpatrick and an identification officer, Constable Harry Shephard, searched the Morin Honda for the gas and mileage documentation and a stick pin worn by Christine Jessop. Under Detective Fitzpatrick's direction, Constable Shephard seized gas and mileage records from the middle console of the car. In recording the seizure, he specifically identified those records relating *to the months of September and October, 1984.* Constable Harry Shephard turned the documents over to Detective Fitzpatrick and, according to Shephard's evidence at the second trial, he did not see them again.

On the same day, Fitzpatrick reviewed them and, according to his evidence before the Commission, he returned them to the identification unit upon finding no record of a gas purchase on October 3, 1984. He testified that he would have either given them back to Constable Shephard or obtained access through the identification unit to the storage room and placed the records with property seized under the search warrant of the Morin residence.

The records consisted of handwritten notations of gas purchases including the date and the kilometre reading at the time of purchase. Fitzpatrick recalled that the records for the months of September and October, 1984 were among those that he reviewed. He could not recall making a notebook entry concerning his examination.

Following Mr. Morin's acquittal at the first trial, an application was made for the return of property belonging to the Morins. Fitzpatrick testified

that upon receiving instructions to return the Morin property, he did so. The gas and mileage records and other property were turned over to Alphonse Morin and his son-in-law. Fitzpatrick testified that he did not consider retaining the original documents as evidence capable of refuting an alibi. Neither did he think that gas and mileage records of a purchase just prior to or just after October 3, 1984 could be relevant to issues at trial. No photocopies were retained. Fitzpatrick could not recall if at that time a notice of appeal against Mr. Morin's acquittal had been filed. He could not recall consulting with a Crown attorney before returning the property but he was sure he would have done so.

It was the position of counsel for Mr. Morin at his second trial that the records between June 1, 1984 and October 19, 1984 were not among those returned. Fitzpatrick testified that he was sure all of the records were returned including those for the months of September and October, 1984 and that it was not possible that the records had been lost.

Detective Fitzpatrick testified before Constable Harry Shephard. Ms. MacLean sought a direction from the trial judge that there was a failure to cross-examine Detective Fitzpatrick with respect to the gas receipts.The trial judge instructed the jury that:

> Sergeant Fitzpatrick was not cross-examined about this gas receipts, thereby he had no opportunity to respond to any inference that any of the gas receipts were seized, and not produced in court or were lost.

In her evidence before the Commission, Ms. MacLean defended Crown counsel's position on this issue for the reason that Harry Shephard's notebook, which had been disclosed, indicated that he was in the company of Fitzpatrick when he seized the records. Further, it was unlikely that Constable Shephard, an identification officer, would have kept a paper exhibit. Therefore, in her view, the defence ought to have raised the issue with Fitzpatrick. She was asked:

> Q. Do you now appreciate that what you did was grossly unfair ... to Guy Paul Morin who's on trial for first degree murder?
>
> A. [I]f there was no reference in the notebook to [Harry Shephard] turning these things over to

> Fitzpatrick, I think you've got a point. But I thought that the disclosure that had been provided made the defence aware of that potential issue.
>
> Certainly the notes did refer to those months of exhibits being seized in the presence of Fitzpatrick, and I would have thought at the very least, Fitzpatrick would have been asked about whether it was turned over to him or not.

Ms. MacLean denied that a decision was made not to recall Fitzpatrick because Crown counsel knew he could not account for the mileage records. While she did not lead Fitzpatrick's evidence and could not recall discussing the issue with him, she understood his position to be that there were no receipts for the months of September and October, 1984. She could not recall the source of this information. It was pointed out to her by counsel that had he conveyed this position to the Crown attorneys, the defence ought not to have been criticized for a failure to cross-examine Detective Fitzpatrick in that his evidence contradicted that of another officer and, further, had not been disclosed.

Findings

There is evidence that the police did receive gas and mileage records for the month of October, 1984. Officer Fitzpatrick says that he returned them to the Morins after the first trial. At the second trial, the defence alleged that these records were not returned. The evidence before me does not permit me to resolve what happen to the records. I would have expected the police to document, in some way, what the records did show and precisely what records there were. I would also have expected that at least a photocopy of the records would be retained by the police, since an appeal was launched within 30 days and a re-trial was a possibility. This, more likely, represents carelessness, than malevolence.

(xv) Robert Atkinson

Mr. Atkinson's Evidence

On October 3, 1984, Robert Atkinson and his friend Doug Thompson were commuting to their work at a manufacturing plant in Holland Landing,

a village approximately six miles away from Queensville. Their shift was to commence at 4:30 p.m. They were proceeded east on the Queensville Sideroad. They stopped at the stop sign at the corner of Leslie Street and Queensville Sideroad for approximately two to three minutes to allow the heavy traffic on Leslie Street to pass. The general store where Christine Jessop had purchased candy after school is located at that corner. Mr. Atkinson testified that while stopped at the sign, he looked at his wrist watch and noted the time was approximately 4:00 p.m.

While stopped, he noticed a little girl wearing a blue top standing across from the store, holding a bag of candy in one hand and a recorder in the other. She appeared to be waiting for someone or something. He testified at Mr. Morin's second trial that, after noticing the recorder in the child's hand, he remarked to Mr. Thompson "How about we can get this little girl to play us a tune while we're waiting." They then proceeded on to Holland Landing for their shift.

After learning of Christine Jessop's disappearance from the media, Mr. Atkinson recognized her picture in the newspaper as the girl he saw standing on the corner. He contacted the York Regional Police on October 10, 1984 as he thought his information might be important to the police in terms of timing. A constable interviewed him at his residence that day, and he recorded Mr. Atkinson as saying that Christine was standing with two small boys approximately her age; also with them was a boy approximately 11 or 12 years of age who seemed to be explaining something to Christine and the two other boys. Mr. Atkinson described this youth in detail: blond hair, white sneakers, a grey fall jacket with a zipper in front, and blue jeans. He did not see a bicycle. There was no doubt in his mind that the girl he saw was Christine Jessop.

Mr. Atkinson said during the second trial that after his October 10, 1984 statement, no police officer contacted him until June 25, 1990. This was during the stay motion. On that date, Mr. Atkinson's father had just died; he was approached at the funeral home and interviewed by Detective Fitzpatrick and Inspector Shephard; he was not provided, at this time, with his earlier statement.

Mr. Atkinson had been contacted a week earlier by Mr. Pinkofsky's private investigator. While the police supplementary report of June 25th indicates that Mr. Atkinson was under the impression that he was speaking

with a member of the Crown attorney's office a week earlier, it would appear that any confusion was caused by an honest error on Mr. Atkinson's part, not by any malfeasance on the part of the investigator or counsel.

Mr. Atkinson testified during Mr. Morin's second trial and also before this Inquiry, that he was told, in no uncertain terms by the police, that the boy he recalled seeing on the corner explaining something to Christine Jessop, was actually a girl. Sometime prior to December 1992, he was interviewed by *The Fifth Estate* and gave them the same information.

During Mr. Atkinson's various court appearances, he demonstrated some confusion as to when and what police force had told him that he had made an error as to the sex of the person speaking with Christine. From the notes of the interview Mr. Atkinson had with the defence on June 21, 1990 (several days before Fitzpatrick and Shephard interviewed him) it is clear that he had already been told by someone that the 'boy' he saw was a girl. With the passage of time it is difficult to sort out this confusion, but it appears likely that he was given this information by the York Regional Police.

In any event, he said that "he believed in the police" and that he, therefore, accepted their version; "who would know better." At the Inquiry, he stated that despite the fact that a police officer had made this suggestion to him, his impression was still that it was a boy.

Findings

I accept Mr. Atkinson's evidence that the police told him that the boy he saw was a girl. I cannot say who communicated this to him. I have already discussed the dangers of suggesting facts to witnesses in conflict with their own recollection. Surely, the witness was in a better position than the police to determine the sex of the person he saw. Police officers must be vigilant in ensuring that they do not temper, however well-meaning, a witness' recollection with their own interpretation of the facts they have gathered. There may be circumstances where a witness' attention has to be drawn to conflicting evidence in order to evaluate the response; however, as we saw at this Inquiry, there are repeated instances where officers appear to 'tell' the witnesses what the facts were. As Mr. Atkinson noted, a definitive assertion by police is often accepted by a witness as being necessarily more accurate than his or her own recollection, and evidence is thereby permanently tainted.

Mr. Atkinson's evidence was heard during Phase IV of the Inquiry (The Investigation by Durham). It is, therefore, addressed in this part of the Report. However, as I have noted above, it may well be that the failing identified in his interviewing process was attributable to York Regional officers.

(xvi) Body Site Screams

Witnesses' Evidence

In the days following the discovery of Christine Jessop's remains, the Durham police conducted door-to-door interviews of residents in the area near the body site to ascertain if anyone saw or heard anything that may be of assistance in the investigation.

Lydia Robertson, who lived close to the scene with her adult son, was interviewed in January 1985. She told a detective that one night, when she was home alone sometime in the fall, around October, she went to bed at about 9:00 p.m. and was awakened by the sound of someone screaming "Help, help." She got out of bed and walked to the front door, but was unable to determine where the noise was coming from. She heard her neighbour's dog barking and what sounded like a female calling for help. Ms. Robertson thought that, perhaps, her neighbours were having a domestic dispute, but she also thought that she heard a child crying and car doors closing. The noise stopped.

When Ms. Robertson's son, Alex, arrived home in the early morning hours, she told him what she had heard. He suggested that the screams were probably from one of the neighbours fighting, she should not worry about it and should go back to bed. While the Robertsons were unable initially to specify the date, Alex remembered that he had been out drinking with his friends that evening and had called in sick at work the next day. After checking his employment records, he determined that the incident had occurred on October 4, 1984, as he was absent from work on the 5th.

Ms. Robertson said that she did not call the police at the time because she did not want to interfere with what she accepted to have been a domestic dispute. She also said that she had called the police on another occasion relating to a stolen vehicle and had gotten 'such a run-around' that she

hesitated to call again.

The day after she was awakened, Ms. Robertson told a friend, Robert Koss, what she had heard the previous evening. Detectives spoke with Mr. Koss in January 1986, and he confirmed that Ms. Robertson had, indeed, told him about this incident.

In the supplementary report documenting Ms. Robertson's statement, she is recorded as saying that she "is positive that her neighbours to the west will know about the screams as their lights in the house came on and their car was in the driveway."

These neighbours, Doug and Sharon Barnes, were interviewed on January 24, 1985. The Barnes' driveway is approximately 200 feet west of the lane way on the south side of the road where Christine's body was found. A supplementary report reflects the interview which Constable Sam Fox had with the Barnes':

> I asked Doug and Sharon if there had been anything come to light which might assist the police in their investigation. Sharon didn't know whether she should mention it or not, but recalls being startled and awoken during the night and believed she heard a yell or scream for help. She woke up her husband Doug and asked if he had heard it, but Doug had been sleeping very deeply and said he had heard nothing. Doug fell back to sleep and Sharon can't recall hearing anything further.
>
> I asked Sharon if she could associate it with any date and she knew that it was after September 7, 1984, because she is a teacher and went back to work that week. ... Sharon thought that it was the baby awake at first, but then realized it wasn't and this is why she knows it was after September 7, 1984.
>
> Then I asked them what time it might have been. They both agreed it was after 10:30 PM because that is when they usually went to bed and Doug knew it was before 3 to 3:30 AM because he starts to sleep very lightly at this time.

The report then concludes:

> After talking with Doug and Sharon for a while, *it was plain to see that they were good hardworking citizens in their 30's, truthful and honest.* Their house was clean and nicely finished. I asked them if they may have had a domestic during the summer or fall that they may have previously been embarrassed to mention that would have accounted for the noise that Mrs. ROBERTSON had heard and they said no. They were not offended in the slightest by this suggestion and said that due to the circumstances that they would say if they had had a dispute, but they both said they get along very well and don't even have as much as a shouting match.
>
> I asked them if they had any parties where one of the guests may have been shouting and they both said they don't have too many visitors and they have had no parties. *Doug and Sharon were very sincere in all of their answers and I believed that what they said was the truth.* (Emphasis added.)

On January 23, 1985, Constable Fox attended another neighbour's home, the Benning residence, which is on the east side of Regional Road 2, immediately north of the Fourth Concession and right across the road from Lydia Robertson's residence. Mr. Benning's evidence was recorded in a supplementary report. It states, in part:

> Mr. BENNING realized that he had also heard the screams that Mrs. Robertson was talking about.
>
> Mr. Benning hadn't called the police back [sic] as he wasn't sure if what he heard was significant. He had worried about it for a week feeling guilty, perhaps that he hadn't called the police when he heard the screams.
>
> He can't remember the exact date of the screams, but earlier in warmer weather and was trying to relate it to other noteworthy dates in the fall.
>
> He recalls he was awoken from his sleep, it was dark, his dogs were making a fuss and the voice was that of a female, but he didn't think it was a childs (sic) voice. He did remember that they [sic] were yells for help and seems to remember the work "help" several times. He thought the youth across the road (Robertson) was having a party and a teenager was yelling so he didn't

pursue it any further.

Constable Fox concluded:

> Having talked with the BENNINGS, Lydia ROBERTSON, Doug and Sharon [Barnes], *I believe that what was heard by Lydia ROBERTSON may be of some significance. This may well be the same thing that Gary BENNING and Sharon [Barnes] heard.*
>
> Lydia went into further detail in regards to the noise, more so that what I have put on paper, as she spoke for sometime and I got the impression she was feeling quite upset for not having called the police originally. I do recall her mentioning a banging noise almost like a stick or piece of wood hitting against some sort of tiny metal object.
>
> She seems to have a good recall of the noises as she was quite disturbed by them that night. She wishes that the policeman that she had talked to sometime before hadn't given her the run-around or she wouldn't have hesitated to call. Lydia had dealings with the police about a year earlier when her pick-up truck was stolen from her driveway and later recovered. (Emphasis added.)

The Jessops' Screaming Test

As earlier noted, incoming telephone calls to the Jessop residence were recorded by Durham police. The log for March 6, 1985, summarizing that day's calls, contains a reference to a conversation between Ms. Jessop and a friend about "[a] woman who heard screaming. Durham said she's an asshole and don't hold any faith in what she says." Ms. Jessop later said that while this remark reflected the sentiment communicated to her by Durham, the language may have been her own.

It is unclear precisely when, but sometime after this conversation, Ken and Janet Jessop went to the body site with a friend of Ms. Jessop. Ken Jessop said that despite the fact that Inspector Shephard and Detective Fitzpatrick had told them that Ms. Robertson was not to be believed and that it was impossible for her to have heard the screams, Ms. Jessop had repeatedly expressed her desire to go to the area herself to conduct a test.

Detective Fitzpatrick could not recall — nor, however, did he deny — telling Ken Jessop that it was impossible for Ms. Robertson to have heard the screams; nor did he recall telling Ken Jessop that Ms. Robertson was 'a loon, a drunk' and that the matter would not be more fully explored by the police.

Upon arriving at the site, Ms. Jessop remained in the area in which her daughter's body had been found while Ken and his mother's friend went close to Ms. Robertson's house. Ms. Jessop then screamed. Ken said that he could hear his mother; however, he did not tell this to his mother as he did not want to upset her further and thought it was best to 'let it lie':

> To tell my mother shortly after she's buried her daughter, I guess someone did — it was possible for her to hear the screams and yet they did nothing, would have been very hard on her.

Ken Jessop advised the police of the fact that a test had been performed. At the second trial, he testified (in the context of describing the first time he had attended the body site) that he had not heard his mother's screams. At the Inquiry, however, he admitted that this evidence was false.

The Police Officers' Screaming Test

On November 25, 1985, at approximately 5:00 p.m., the Durham police conducted its own 'screaming test.' Detective Fitzpatrick and Inspector Shephard went to the home of Lydia Robertson, while Detective Doug King, accompanied by his two daughters aged 8 and 11, stayed at the body site approximately 0.2 kilometres away. The girls took turns screaming for help while Fitzpatrick and Shephard listened.

The police notes documenting this test did not record the wind conditions, although Detective Fitzpatrick recalled it was a fairly calm day. From his position outside the back door of the Robertson residence, Inspector Shephard could barely hear the screams of the younger child and he could not make out her words. Detective King's supplementary report indicated that this child had a cold at the time and was not screaming at her full capacity. Inspector Shephard could clearly hear the screams of the second child. When the detectives listened from inside Ms. Robertson's bedroom through an open window, they could hear the sound of one of the children faintly and could make out the words "don't, help, help, don't."

Nonetheless, they concluded that it was unlikely that Ms. Robertson would have been awakened by the screams. Inspector Shephard said that he communicated the results of this test to John Scott, but he could not recall the actual discussions between them. He conceded that the sound conditions under which the test was performed might be significantly different from the conditions that existed in the early morning hours when Ms. Robertson claimed to have heard the screams. While he did not give the wind conditions any thought, Detective Fitzpatrick expressed his opinion that the sounds of traffic would not have been significantly different at 5:00 p.m. from those in the early morning hours.

The Crown's Handling of this Information

Prior to the first trial, John Scott was aware, through Clayton Ruby's change of venue materials, that Ms. Robertson had heard screams on the night of Christine's disappearance. Mr. Scott said that either Inspector Shephard or Detective Fitzpatrick dismissed this information as relating to "a lady who had some difficulties and domestic problems of their neighbours." Mr. Scott was not aware of Constable Fox's assessment of the Barnes — the neighbours in question — nor was he aware of their evidence that they did not have an argument at that time. Mr. Scott said that he did not read the original supplementary reports and relied on the opinion of the officers as to the veracity of the information.

Mr. Scott was not aware of the scream test conducted by the Jessop family prior to the first trial. He also claimed that he was unaware of the scream test performed by detectives on November 25, 1985. The officers' notebooks reflect that they were with Mr. Scott in the morning before the test.

Mr. Scott was called as a witness during the stay motion. He said that he understood Ms. Robertson to be unreliable because she had initially thought that the screams occurred around Thanksgiving (October 8, 1984). As stated above, the Robertsons subsequently discovered that, according to Alex Robertson's work records, they had overestimated the date by one week. Mr. Scott also believed that Ms. Robertson was unreliable because it was assumed that the murder had occurred the evening that Christine Jessop was abducted, while the screams were heard 24 hours later. Here are some excerpts from his evidence before the Commission:

> Q. Did you believe at any time that there was a

> possibility that Ms. Jessop had been killed after the date of her abduction?
>
> A. Certainly that's a possibility, but I didn't think it was a valid one.
>
> Q. Why?
>
> A. Just as I — I think I've indicated in the transcript, didn't see this nine year-old being kept alive past that date.
>
> .....
>
> Q. I'm just asking, if there's any objective facts of which we're not aware that would have led you to the conclusion that she had been killed the date that she was abducted, as opposed to a day later or a week later?
>
> A. The only one is that I just can't imagine how one would control a nine-year-old for that time period. But it may — it's a possibility. Do you see what I mean?
>
> Q. Well I hear what you're saying, but controlling a nine year-old, by that, you mean would they have a place to put her or ... ?
>
> A. All those things. I mean, where do you hide a nine-year-old that's not yours, for overnight? I mean, there's - in the trunk? I mean, I just don't think so. It's an awkward thing to try and conceal for some time period. That's my view, but you appear not to share that.

While Mr. Scott's view may be honestly held, it is a narrow and somewhat naive view of the evidence; a number of crimes have been perpetrated where a victim has been abducted and kept for a lengthy period of time.

Mr. Scott said that he learned of Ms. Robertson's screams from Mr. Ruby's material for the change of venue application; a newspaper article was included reporting about the Robertsons. He did not remember if he was informed verbally or in writing about the scream test conducted by the police, but said that the defence was not provided with any information about this incident prior to the first trial.

Mr. Justice Donnelly held that this non-disclosure was a technical breach, but ranked very low on a scale of transgressions. The screams lacked a direct nexus, His Honour said, and were of questionable reliability.

While it was suggested by counsel for the Morins that the prosecution was selective about what it considered to be credible evidence, both Leo McGuigan and Susan MacLean testified that Ms. Robertson's evidence was not viewed by Crown counsel as reliable. Ms. MacLean described Ms. Robertson as 'a real character.' and said that alcohol may have been involved that evening. Neither the defence nor the prosecution called Ms. Robertson or any of the other scream evidence at either trial. An analysis of the police notebooks demonstrate that Mr. McGuigan met with Ms. Robertson on February 7, 1991. Ms. MacLean said that Ms. Robertson told them that she was "stashed" on the night in question. Ms. MacLean's notes reflect the following:

> Lydia Robertson — Screaming.
>
> 1. Do we want to call expert re: effects of longterm alcohol abuse
>
> 2. Let Jack call the evidence and cross-examine on it

Findings

I cannot say whether the screams described by Lydia Robertson and her neighbours were those of Christine Jessop. That is an assessment that must be made by those who may re-investigate this homicide. Constable Fox deserves praise: his interviews with Ms. Robertson and her neighbours were professionally done and properly documented. His conclusion that what Lydia Robertson heard "may be of some significance," was an astute assessment of the incident, whether or not the screams were those of Christine Jessop. This information deserved better treatment from his colleagues. It is highly regrettable that Lydia Robertson's evidence and the neighbours' additional evidence were dismissed so lightly.

The screaming test conducted by the police was defective. The time of day was different, and even if the conditions were the same, the fact remains that the screams of at least one of the children could be heard. It was entirely likely that the lead investigators' approach was obscured by their firm belief that Mr. Morin was guilty. This has been a recurrent theme in this

Report.

(xvii) Ken Doran

Ken Doran was a cell mate of Mr. X at the Whitby jail who was in custody during the same time period as Mr. May and Mr. X. In November 1985, he was interviewed by Inspector Shephard in connection with this investigation. He was questioned about the nature of this interview during the Inquiry:

> Q. Okay. And this occurred back in November the 22nd of 1985, and do you recall alluding to the fact that he [Mr. Doran] could be charge [sic] with attempt to obstruct justice if he wasn't prepared to speak to you?
>
> A. Yes, sir.
>
> Q. All right.
>
> A. I don't think that's exactly what I said. I think I said something to the effect that he was verging on attempt to obstruct justice, or obstructing the police, or something to that effect.
>
> Q. By not speaking to you?
>
> A. By not speaking to me, yes, sir.
>
> Q. Was he verging, in your mind, on attempt to obstruct police or obstruct justice by not speaking to you?
>
> A. No, sir. It was his privilege and if he didn't want to speak to me, but I was trying to urge him to speak to me.
>
> Q. Do you think that that's an appropriate thing for an investigator to do, to use the ---
>
> A. Obviously, I did, or ---
>
> Q. --- threat of criminal charges?
>
> A. Obviously I did at that time, or I wouldn't have done it.

Q. What about now?

A. Well, I'm not involved in police work anymore, but it's pretty tough when you're trying to find out, or speak to somebody about something, and they won't talk to you. So you try to use as many things as you can, and in this case, it may have been beneficial to Mr. Morin had he spoke to me. I didn't know, because what I was trying to find out was — well, I'm sure you know was I was trying to find out, was whether Doran actually could hear May or — yeah, May and Mr. Morin speaking. So it may have been beneficial to him.

Q. Of course, the defence, as you'll recall, by November of 1985 was not only aware of Mr. Doran, but apparently were preparing an affidavit for him. So Mr. Morin was certainly in a position through his counsel to address the beneficial aspects of Mr. Doran's ---

A. Yes, sir, that' s correct.

Q. Did you ever obtain photographs of the body of Christine Jessop to display to witnesses when you were about to interview them?

A. I don't think I'd ever so that.

Q. All right. If I could have Volume 277, please? This is evidence at the second trial, Volume 277, p. 45. I'll start at page 44, line 19:

> Q. Now as one of the investigative — sorry, interview techniques that you view as proper, if it's necessary to sort of threaten someone or suggest to someone that they might be criminally charged, that they're risking criminal charges, is that sort of the technique you use to get them to talk to you, or a technique you use to get them to talk to you?
>
> A. Yes, ma'am.
>
> Q. You used that in this investigation on occasion, didn't you?
>
> A. Yes, ma'am.

Q. And you've probably used it in other investigations, or have you used it in other investigations?

A. Probably.

Q. And depending on the person, I guess it might work, it might not work; correct?

A. Correct.

Q. Sometimes you can get people to talk to you and go along with your questioning without having to resort to that kind or threat or suggestion; right?

A. Yes, ma'am.

Q. Is one of the tactics that you've used in this case to obtain the photographs of the body of Christine Jessop to display when you're about to interview somebody?

A. Yes, ma'am.

Q. Those photos, you agree with me, are gruesome and horrible?

A. Yes, ma'am.

Q. That's the kind of technique that you use as a police officer, in your assessment, could be useful when you're trying to interview somebody?

A. Yes, ma'am.

Q. It sort of has a shock value, doesn't it?

A. Yes, ma'am.

Findings

I do not accept that Inspector Shephard was motivated, even partially, to obtain Ken Doran's account because it might have been beneficial to the defence for Shephard to do so. Shephard anticipated that Doran might well

be a defence witness and he wanted to know what Doran would say and, if it was exculpatory, pointedly question him. There would be nothing improper in any of that. However, Shephard, in effect, tried to intimidate Doran through a heavy-handed suggestion that Doran could be charged with a crime (which, of course, was incorrect) for failing to speak to Shephard. This was an abuse of his powers as a police officer and is a completely inappropriate tactic.

D. Contentious Witnesses of the Crown

(i) Introduction

A number of contentious witnesses were tendered by the prosecution against Guy Paul Morin. Some of these witnesses have been addressed in other parts of this Report. This portion of the Report focuses on several witnesses whose evidence raises recurrent themes. These are Constables Robertson and McGowan, Paddy Hester, Doug Greenwood, John Carruthers, Leslie Chipman, Mandy Patterson, Janet Jessop and other witnesses as to the 'funeral night screams'.

Some of the common issues which arise through these various witnesses are: the manner in which their evidence was obtained; when their evidence came forward; how 'late-breaking' or 'untimely' allegations by witnesses were handled, how their reliability was assessed, and how their evidence was presented to the jury.

Another recurrent theme is the use of much of this evidence to demonstrate that Guy Paul Morin exhibited, through his words and conduct, a *consciousness of guilt.*

During closing argument by the prosecution, Mr. McGuigan addressed evidence of 'consciousness of guilt' and 'very unusual and strange behaviour' at some length.[23] These passages are particularly significant:

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[23] The evidence put forward at the first trial varied from the evidence tendered at Mr. Morin's second trial. At the first trial, as described elsewhere in this Report, witnesses such as Robertson, McGowan, Greenwood, Carruthers, Hester and Chipman, were not called. In fact, there was very little evidence led by the prosecution from witnesses regarding Mr. Morin's 'unusual conduct and demeanor'; the evidence of Mandy Patterson being one exception. The term 'consciousness of guilt' was not employed by Mr. Scott in his closing

> There is in this case circumstantial evidence upon which the Crown submits an inference of consciousness of guilt may be found. Failure of the accused to search for Christine Jessop and all the circumstances. Number two, failure of the accused to attend the funeral or the funeral home or to even express his regrets to the Jessop family on the disappearance and murder of Christine. Three, the crying out or screaming by the accused of words to the effect "Help me, help me, oh God, help me" on the night of the funeral of Christine Jessop.
>
> The accused on Saturday October the 6th, '84, running out of his residence, yelling and waving his fists at Paddy Hester and and [sic] yelling "Get away from my car" when she was at the '77 Honda passenger door. If you — we heard evidence that Mrs. Morin did not let the dog out. Mr. Morin says he didn't let the dog out. If you accept Constable Robertson's evidence, somebody let the dog out. Only three people in that home and if it's the accused, if you find that, that the accused is the person who released the dog at that time, I submit to you that that is evidence that's capable of being evidence of consciousness of guilt.
>
> The utterances of the accused to Mandy Patterson we have previously discussed. Number seven, "otherwise I'm innocent" comment during the recorded portion of the February 22nd statement to Inspector Shephard and Detective Sergeant Fitzpatrick.
>
> .....
>
> Now, this is a heading called unusual conduct or demeanour. The accused's conversation with Mandy Patterson, speaking in a very uncaring fashion which was different from his usual manner. And I ask you, as I indicated before, this was a friend of his I point out to you. The observations of P.C. McGowan because during his attendance at the house between 8:30 and 8:45 on October the 3rd he testified he spoke to Mrs. Morin and the accused was sitting about eight feet away staring straight ahead; did not turn towards the conversation even though P.C. McGowan was speaking

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address, nor by Mr. Justice Craig in his charge to the jury.

> in a fairly loud voice.
>
> The evidence of Paddy Hester at some time around or after midnight, she observed the accused in the red pick-up truck sitting staring straight ahead. The encounters of the accused with Leslie Chipman and Christine within the two weeks prior to October 3rd, '84 where he was clipping the hedge, called them over to talk and she observed the white knuckles while talking and holding the hedge clippers due to holding them too tightly. Secondly, clipping the same hedge the next day and within the next week while the young girls were present.
>
> Now those are some very unusual and strange type of conduct and demeanor, in my respectful submission, that I'd ask you to look at.

In discussing Mr. Morin's activities on October 3, 1984, Mr. McGuigan also said this to the jury:

> [I]f the accused went shopping he couldn't get home until 5:00 or 5:30. He gets home, has a nap, helps his father with the renovations. Would a man who just killed a little girl be helping his father with construction work? Problem: This trial, as you heard in cross-examination neither Mr. Greenwood nor Mr. Carruthers were ever called as witnesses at the last trial. Their testimony indicates that the accused was not helping out his father when they made their observations. You have not heard from any witnesses other than his immediate family that he was out working that evening.
>
> I'd ask you also to look at the evidence of Constable McGowan. Somewhere between 8:30, quarter to nine goes to the house. Accused sitting there staring straight ahead.
>
> .....
>
> Mr. Pinkofsky made a prediction that I would refer to the fact that the accused, accused people of being mistaken. And his prediction is accurate. The accused testified that a number of people were mistaken in their testimony and I'll list some of them, but not all of them.

> Mr. Greenwood testified about seeing a 50ish neighbour outside by a cement mixer, but he didn't see the accused and this was about 8:50 p.m. Mr. Carruthers testified that around nine o'clock, a little after nine he and Greenwood went on to the Morin property to search. Both recall looking into the trench and he didn't see the accused. And both observed a cement mixer tumbling. The accused says they're both mistaken; one, re: the cement mixer. I think it should be pointed out or I'm sure you're aware from the evidence that Mr. Greenwood is a contractor and I submit he would or certainly should recognize a cement mixer when he sees one.
>
> He testified that Paddy Hester was mistaken about seeing him and others in this red pick-up truck on October 3rd, 4th, '84; that he never came running out of his house on October the 6th when she was there.
>
> Mandy Paterson was mistaken as follows: about him appearing not to want to talk about Christine's disappearance. She was also mistaken that he displayed an uncaring manner when discussing the murder of Christine Jessop. Three, that he told her Christine was killed the night that she was taken. In relation to Mandy Paterson, Mandy Paterson was a friend of his. This was not an enemy. This was someone who got along with him well and this is her testimony.
>
> Leslie Chipman was mistaken; one, he never beckoned Leslie and Christine over to his property; one (sic), they never came over to his property and talked to him; three, he wasn't cutting that hedge on more than one occasion because his evidence is that he only cuts that hedge once a month.
>
> Robertson was ... mistaken when he says the only conversation that they had pertained to having the dogs taken in, mistaken that anyone let the dogs out while Ryder, not Constable Ryder, but Ryder was at the passenger side of the Honda.

The trial judge made extensive reference to evidence of 'consciousness of guilt' in his charge to the jury. These passages are illustrative:

> During the three months Christine was missing and

following the finding of her body he did not express his concern to Mr. and Mrs. Jessop, go to the funeral home or go to the funeral. He spoke of not being invited to the funeral, and said he offered sympathy to Janet's father, Gordon Simpson, who died about four years ago. Evidence the accused failed to attend the funeral or the funeral home, or offer condolences is tendered as conduct which you may find to be consistent with his knowledge as the guilty party. It must not be used as evidence of bad character of the accused, making it more probable that he committed the crime.

.....

If you accept this evidence, you may consider whether, in light of any explanation offered, the accused's conduct in failing to search was so unnatural that you accept the inference that the conduct was the product of a mind conscious of its own guilt relative to Christine Jessop's disappearance and death.

.....

The accused's work record constitutes evidence from which you may find the accused, in attempting to explain his failure to search for Christine Jessop on November 10th, 1984 [by alleging he had to work overtime], made a false statement under oath at the first trial. That type of statement, after a crime has been committed, can be evidence of consciousness of guilt. The law recognizes a guilty party may tell a false story, in order to escape the consequences of the crime.

.....

The Crown also points to the evidence of the conduct of the accused within a few hours of Christine Jessop's disappearance, which is said to be consistent with his guilt, as follows:

> a) Officer McGowan's observation the accused sat staring straight ahead, apparently at the television, when McGowan called at the Morin residence about 8:30 to 8:45 p.m., October 3rd.

.....

> In these proceedings there is evidence upon which you may find the accused to have said or done things, subsequent to the death of Christine Jessop, which you may find demonstrate a consciousness of guilt on his part, in respect of her death. The following are the principal items which are capable of supporting an inference of consciousness of guilt. Whether the accused said or did these things, and whether they support that inference, is a matter for you, as is their impact, if you do find that they do support that inference.
>
> 1) Whether the accused told a proven lie under oath, regarding his failure to search on November 10th, 1984;
>
> 2) Failure by the accused to search for Christine Jessop;
>
> 3) Paddy Hester's observations of the accused's actions while she was attempting to look inside the Morin Honda on October 6th, 1984;
>
> 4) The utterances attributed to the accused, by Janet Jessop, on the night of Christine Jessop's funeral;
>
> 5) The accused's utterance of February 22nd, 1985, "I bet little Christine is gone."
>
> 6) The accused's utterance of February 22nd, 1985, "Otherwise I'm innocent."
>
> 7) Mandy Paterson's observations of the accused's accompanying demeanour when he said, "No, she was killed the night she was taken."
>
> 8) The statement attributed to the accused that he would consider entering a guilty plea to this murder charge of not guilty by reason of insanity.
>
> 9) The issue of whether the alibi evidence given by the accused was fabricated or concocted.

Indeed, it was alleged by counsel for the Morins that the phrase 'consciousness of guilt' was used 46 times in the charge to the jury, 'guilty knowledge' nine times, and 'a mind conscious of its own guilt,' 'consistent

with guilt,' 'inference of guilt,' and 'indicative of guilt' once each.

I have not counted the number of times these terms have been used. Suffice it to say, use of this language was a prominent part of the instructions to the jury.

In the course of the Inquiry, Brian Gover, a Crown attorney who had carriage of the case during the stay motion, said this:

> I think in retrospect one of the lessons of the Inquiry will be that consciousness of guilt evidence has to be approached with great caution and that in retrospect, the evidence of consciousness of guilt in this case, was problematic and perhaps ought not to have been led to the extent that it was.

Alex Smith told the Commission that he had never done a trial previously where consciousness of guilt evidence played such a substantial role. He said:

> On reflection, and with the assistance of cases from our Court of Appeal and other courts, I think I have a different perspective with respect to consciousness of guilt evidence than I did then. And I think, frankly, my perspective now is healthier than the perspective I had then.

To foreshadow my later findings and recommendations, I am of the view that considerable evidence which had little or no probative value was presented to the jury as evidence of consciousness of guilt. I have no doubt that this evidence, viewed cumulatively, contributed to the miscarriage of justice. To quote the British Columbia Court of Appeal in *R. v. Campbell*[24] (more extensively cited below):

> I believe that a trial judge should consider carefully whether it is really necessary, other than in relatively rare circumstances, to instruct a jury concerning this subject.
>
> .....

---

[24] (January 12, 1998),[unreported] at paras 21 and 23.

> I have the impression that trial judges are now more frequently being asked to give and are giving instructions about certain evidence in a case being possibly indicative of consciousness of guilt. It is a trend that is not, in my view, a happy one and I believe this should rarely be invoked as a possibly probative factor of proof of guilt. *If the crown case is so tenuous that this sort of evidence must be relied upon, it is in many instances not much of a case.*(Emphasis added.)

(ii) Constable David Neil Robertson

August 16, 1989 Meeting

On August 9, 1989, Elisabeth Widner, who was Mr. Pinkofsky's co-counsel at the second trial, wrote to Crown counsel requesting disclosure on a number of topics, including information relating to prior contacts with the Morins, sightings, and tracking dogs. John Scott, who still had carriage of the prosecution at that time, made some inquiries and determined that the information he had obtained from the York Regional Police force was incomplete. Ms. MacLean testified that many officers involved in the York Regional investigation had not made notes, and logs were missing from the command post. The activities of officers in the missing person investigation were, therefore, not fully known. As Mr. Scott had not received satisfactory answers to his queries, a meeting was organized at the York Regional Police offices for August 16, 1989, from 7:15 p.m. to 10:30 p.m. Numerous York Regional officers attended, including Constables Robertson (who was then a member of the Collingwood Police Force, having left the York Regional Force in July, 1985) and McGowan and Inspector Wilson, as well as other officers who had assisted with the search on the evening of October 3, 1984. Inspector Shephard from Durham also was present.

Mr. Scott arrived at the meeting late. There was a general conversation with the group about the status of their will-says and the disclosure requests contained in Ms. Widner's letter.

Mr. Scott said he hoped that will-says would be prepared that evening; however, as many officers had not brought their notebooks, they were unable to do so. He did not ask this collective unit about their individual recollections during this meeting. He recalled, however, that at one point in the evening, the officers broke into smaller groups to perform the work

requested of them.

In retrospect, this was an unfortunate move, particularly since it was possible that, without their notebooks, at least some of the officers would adopt statements made by those who had notes. The evidence suggests that insufficient — if, indeed, any — thought was given to this fact, but I do not see this incident as an attempt to avoid unwanted diversity in the will-says. The Crown, I believe, was frustrated by the lack of information, and hoped to break the log-jam that night. I have already expressed my view that, in future, greater care should be taken to avoid contamination of evidence, through collective recollection.

Mr. Scott recalled meeting David Robertson. This was the first time Constable Robertson spoke about evidence relating to his dog that might be relevant to the prosecution of Guy Paul Morin.

As I noted in Chapter IV, Constable Robertson was detailed to the Jessop residence the evening Christine disappeared and arrived there at 12:10 a.m. on October 4th. Upon arrival, he received permission from the patrol sergeant to use his own dog, Ryder, a male German Shepherd, to assist him in the search. (The York Regional Police did not have a canine unit.) He went to his home in Newmarket, retrieved his dog, and arrived back at the Jessop residence around 1:00 a.m.

Constable Robertson's detailed notes, documenting his activities of that evening, made reference to buildings he examined, vehicles he looked at, bushes he went to, swamps he viewed, properties he searched, people he spoke with and things he found. Although he made copious notes (in addition to detailed supplementary reports) of his actions on the morning of October 4th, he made no reference in these documents to any observations or events relating to the Morin property which he mentioned to Mr. Scott almost four years later and to which he later testified.

The entry in Constable Robertson's notebook for the August 16, 1989 meeting reads as follows:

> Looking for details not mentioned in the first trial, information, etc. Further discussion to take place regarding new information from officers' notebooks, etc.

Constable Robertson said that when he attended the meeting at York Regional, it occurred to him, for the first time, that a positive reaction by his dog in the early hours of October 4th, had significance to the prosecution of Guy Paul Morin. He testified that during this meeting he was asked about his activities with his dog and this prompted a discussion of Ryder's reaction at the Morin vehicle. He described the events to Mr. Scott without the benefit of his notes or supplementary reports.

Mr. Scott was surprised that he had not learned of Robertson's evidence relating to his search before August 1989. He testified, however, that Constable Robertson told him that he had passed on this information to someone else at an earlier time. This type of breakdown of communication had occurred so many times that it took on a credibility with Mr. Scott that served to appease his concerns regarding this late-breaking evidence. He also reflected on the fact that, at the time Constable Robertson was involved, the nature of the investigation was that of a missing child.

Constable Robertson received a copy of his notes in the mail and, at some point which is not altogether clear, drafted his will-say. His notes indicate that on August 30, 1989 he drafted his will-say. He testified that he may have been working on it that day. According to defence records, the will-say was marked "received January 2, 1990." However, Constable Robertson's notes indicate that on May 1, 1990 he received a request from the York Regional police for a copy of his notes and will-say.

Constable Robertson's first will-say records his activities reflected in his notebook and then reads as follows:

> (from memory not detailed in notes)
>
> While at the Jessop residence, a sweater belonging to Christine was obtained for the dog. A search was then made of interior of Jessop residence and property.
>
> The property to the South checked negative. Prior to attending the property to the North, request was made via another Officer, for the occupants of the house to stay inside and contain several dogs that were loose (1 large dog). This property was rather messy, and had some construction going on around front area.
>
> The dog was used to cover entire property, including

> attached garage with an old car in it. Out in the yard, were two vehicles, one a small light coloured car. The dog reacted around this vehicle, by jumping up on the passenger side door area, but due to a distraction from the house as somebody let a dog out, my dog was taken back from this area of the ground. I feared an encounter with another dog.
>
> I feel the dog showed a positive reaction to this vehicle. Officers then had words with occupants of house. It was mentioned that both houses would be searched again in daylight.
>
> My view was, that these people (I observed a male and female) were not very accommodating for being neighbours and the nature of search.
>
> (Return to notebook at 3:45)

The remainder of the will-say reproduces Constable Robertson's detailed notebook entries which, as stated above, contain no mention of his activities on the Morin property.

Constable Robertson's contemporaneous notes of the evening are also devoid of any comment about retrieving an article of Christine Jessop's clothing in order to assist his dog with a scent discrimination task. Nowhere do his notes make any reference to his dog's reaction to Christine Jessop's bicycle or to the Morin Honda. Nor is there any contemporaneous documentation about other evidence he later supplied in his testimony, which was put forward by Crown counsel as indicative of Mr. Morin's consciousness of guilt. This will be explored later in this chapter.

Constable Robertson was still with the York Regional Police force when Guy Paul Morin was arrested. Though he purportedly had evidence (later tendered at the second trial) which related to Mr. Morin's guilt, he did not bring it forward when Guy Paul Morin was arrested. He left his notebooks behind with the York Regional Police force when he departed. He was not called as a witness during the first trial, nor was he asked to prepare a will-say outlining his activities in connection with his search for Christine Jessop.

November 20, 1990 Meeting

On November 20, 1990, a meeting was held in the York Regional Police headquarters boardroom. It lasted several hours. Present were Crown attorneys Leo McGuigan, Alex Mr. Smith and Susan MacLean, Officer Chapman, and the two lead investigators, Inspector Shephard and Detective Fitzpatrick. Seventeen officers from the York Regional force who were involved in the missing persons investigation (including Rick McGowan, David Robertson and Raymond Bunce) also were there to review their recollections of the events.

By this time, Leo McGuigan had been appointed as the lead prosecutor in charge of this case. He agreed with a suggestion made to him at the Inquiry that police witnesses, like civilian witnesses, ought to be interviewed individually. These were his comments:

> Q. I think you and I had agreed yesterday that matters that don't go to the substance of what a witness has to say can be dealt with collectively, but when one is dealing with the substance of one's evidence, that officer ought to be dealt with individually in the same way as the evidence of a civilian ought to be dealt with individually. Is that fair?
>
> A. Yes, I think that's fair, and if you do it otherwise, you run the risk of being criticised by defence counsel for the manner in which you've interviewed the witnesses.
>
> Q. And in fairness, it's not just a matter of being criticised by defence counsel; you run the risk that one of the officers' evidence is polluted by hearing what the other officer has to say.
>
> A. Well, if it relates to the same issues.
>
> Q. Of course.
>
> A. Yeah, but — well, I suppose that is correct, but I'm not sure what the issues were here. These were people, I think, that had been involved in searches, and some who had been down at the town hall, or wherever it is that they set up the command post.

He recalled attending two meetings where York Regional officers were assembled as a group.

Mr. McGuigan said that the primary purpose of the meeting was to introduce the new Crown attorneys. Officers were advised that their evidence was relevant to issues that would be raised at the second trial and that they would be interviewed and called as witnesses. They were further instructed that they should submit their will-says if they had not already done so. He said that individual interviews were then conducted in Inspector Wilson's office and in other areas. Mr. McGuigan commented that irrespective of the appropriateness of interviewing officers jointly where there may be diversions on certain issues, it would also be a highly inefficient way of preparing a witness for trial.

The evidence of Inspector Shephard on the Crown meetings with York Regional officers generally, differed somewhat from Mr. McGuigan's recollection. Shephard said that a group setting, rather than individual meetings, was organized because "that's the way things were done at that time." He did not recall any segregation at the meetings. At that time, Inspector Shephard did not see a problem with gathering evidence in this manner, although he would not have permitted a meeting similarly structured with civilian witnesses. When he provided evidence before this Inquiry, he appreciated that such a process could give rise to a concern that evidence obtained through a group setting may lack independence. In cross-examination, Inspector Shephard said that it was possible discussions of a general nature were conducted in the group setting.

Detective Fitzpatrick recalled everyone sitting around a table in a boardroom at York Regional police headquarters during this meeting. Mr. McGuigan went around the room asking each officer individually what he had done upon arrival at the Jessop residence and thereafter. Fitzpatrick testified that he had been involved in this kind of meeting in other cases and did not have a concern about potentially tainting witnesses who could hear the anticipated evidence of other witnesses. Detective Fitzpatrick could neither recall nor deny that officers were separated for individual interviews after a group meeting concerning "general instructions". He recalled, however, that when the officers attended in London for their testimony they were interviewed separately. That, of course, is the way in which it should have been done in the first place.

As indicated above, meetings of this nature should be avoided. There may be occasions — and I speak of this elsewhere — where a number of potential witnesses might, quite legitimately, be gathered together: for instance, when general instructions are given by counsel on what a witness might expect in court. Indeed, the discussion might even go beyond that. But what must be avoided is the discussion of substantive matters collectively, where officers draw (consciously or otherwise) upon the evidence of others. Clearly, when that occurs the value of their testimony is greatly diminished, and the consequences can be grave. Indeed, as pointed out in other parts of this Report, the memory of a number of participants improve remarkably after some of these meetings.

Scent Discrimination Evidence

Constable Robertson was called by Crown counsel at the second trial to provide evidence of his activities on October 4, 1984, relating to scent discrimination work performed by his dog. However, he said he was aware that such a request was made. His expertise as a dog handler, and the ability of his dog, Ryder, to scent discriminate were contested at the pre-trial motion before the second trial. Robertson had never before given evidence in tracking or scent discrimination work. He testified that while he had never been employed as a police dog handler *per se*, his expertise was based largely on the following facts:

1. He was brought up in a family with dogs, though he conceded he was not involved in training them.

2. He had assisted at kennels during his R.C.M.P. basic training.

3. While in Regina, he frequently worked closely and became very friendly with Peter Payne, an R.C.M.P. dog handler. In March 1968 he volunteered to assist Payne when someone was needed for tracking or attack work. He testified that through his experience with Officer Payne, he learned obedience training, attack, guard work and tracking.

4. His previous dog, Jesse, was used by Payne for a couple of weeks when Payne's dog was sick. Payne thought so highly of Robertson's dog that he advised his superiors that Jesse was qualified to work as a tracking dog.

5. He worked closely with half a dozen other R.C.M.P. dog handlers and had attended an R.C.M.P. course for potential dog handlers.

6. He and his dog(s) had previous experience in assisting to track two missing persons (in one case he said Ryder found a missing child in a covered sandbox), had helped track a number of escaped jail inmates and had detected illegal drugs during an arrest.

Philip Hoelcher, of Miami, Florida, an expert qualified in the field of dog training, handling, tracking and scent discrimination, testified for the defence during the pre-trial motion into the admissibility of Robertson's evidence. Hoelcher had been involved since 1974 in the training of German Shepherds and trainers. It was his opinion that neither Robertson nor Ryder were qualified to be proficient in dog scent discrimination work or tracking, and that, in any event, neither Robertson nor Ryder could reliably do what Robertson had claimed they had done.

Constable Robertson testified that he had purchased Ryder in January or February of 1984. He said that Ryder was serviceable as a tracking dog by June or July of that year. He trained Ryder himself, first in obedience and then in a form of tracking. He said that Ryder, as part of his training, had successfully tracked neighbourhood children in the bush and in a lumber yard and could single out a child whose scent had been provided on a baseball glove. After six months of training, Ryder was, in his opinion, very efficient in tracking people and detecting drugs.

Mr. Hoelcher testified that it was not viable that a dog could locate a person after having been introduced to a specific human scent; this was a myth. He said that the type of scent discrimination claimed to have been performed by Ryder had never been replicated by experts in the field:

> Q. So the cross scents or cross tracks have no bearing on whether her scent was contaminated inside the vehicle.
>
> A. And the only way that I could answer you is that there's no way the dog smelled the shirt and carried that odour picture in his mind, went to the car, and said "I smell the same odour inside the car as I did however long ago when I smelled the shirt." That doesn't happen.

Q. In your experience.

A. In my experience, in my opinion.

Q. You would agree that other people have other theories on the subject?

A. Absolutely do.

Q. And disagree with you on that point?

A. Absolutely do and many of them have tried to prove me incorrect and —

Q. So - I'm sorry. I didn't mean to interrupt you.

A. No problem. I just have never seen them prove me incorrect in front where they can do it. I have watched a thousand people attempt to do it and I've not seen it work yet.

Q. But that's your opinion as to whether they are correct or not.

A. No. It's not my opinion, it's a fact.

Mr. Hoelcher testified that dogs trained to search for narcotics do so by way of scent discrimination, requiring an intense 400-hour training period. Even then, the scent or odour that the dog is trained to locate must be constantly refreshed in the dog's mind. In his opinion, it was impossible for Ryder to have been introduced to an odour from a sweater of the victim and then to have retained it in his mind for a period of time. Assuming that Ryder did react at the Morin Honda, he could have been reacting to any number of scents, including for instance, the scent of the Morin dogs. Mr. Hoelcher further testified that tracking was also impossible in the search for Christine Jessop because of the fouling of scents at the scene by other people before Robertson and Ryder arrived. He concluded that neither Robertson nor Ryder could have done what Robertson claimed.

After hearing lengthy pre-trial arguments, Mr. Justice Donnelly found that Robertson was qualified as an expert scent discrimination dog handler and that his dog was qualified to perform scent discrimination. Accordingly, he permitted Crown counsel to lead evidence of the dog scent discrimination work allegedly performed by Constable Robertson's dog. In his reasons,

however, the Judge added:

> The jurors must be instructed that they are not simply making a choice between two expert opinions. They must be told that before acting upon either expert opinion, they must be satisfied as to its reliability. They must be instructed that the dog scenting evidence must be received with caution, and must not be given undue weight. That evidence is not, in itself, evidence that the accused committed the crime. It may be an indication that Christine Jessop had been at the Honda car before the arrival of Ryder.
>
> The evidence of the actions of the dog is not the only evidence linking Christine Jessop to the Honda car. There is also the scientific evidence of the hair and fibre. The weight to be given to the dog scenting evidence must be considered in the context of the entirety of the Crown's case.
>
> The dog scenting evidence is admissible.

In his later charge to the jury, the judge used similar language: It was for them to determine whether the dog evidence actually linked Christine Jessop to the Honda, much like it was for them to determine if the hair and fibre evidence also linked her to the car.

The Blue Sweater

As the first officer on the scene, one of Constable Rick McGowan's tasks was to keep a log of everyone who attended or left the Jessop residence. While many police officers' names were recorded entering the residence, Constable Robertson's name was not amongst them. In McGowan's report that he prepared for the missing person investigation he noted that Christine Jessop was wearing a blue front-zippered sweater when she disappeared. Constable Robertson's notes also recorded the blue sweater as part of the description of Christine Jessop's clothing of which he had been advised at the police station prior to his attendance at the Jessops.

Before Constable Robertson arrived at the Jessops' home, Janet Jessop and some York Regional officers, including McGowan, had searched the house several times in an unsuccessful attempt to find Christine. No one could recall seeing a blue sweater on the bed.

During the trial proceedings, Robertson testified that Constable McGowan took him to Christine Jessop's upstairs bedroom. According to Robertson, a blue sweater was on her bed. He was led to believe by McGowan that Christine had worn the sweater that day. Robertson testified that he used this blue sweater to provide Christine Jessop's scent to Ryder. His evidence about finding and using this blue sweater was crucial to his overall testimony relating to scent discrimination, as it was his assertion that this sweater was the source of the scent which enabled his dog to perform the discrimination task. Scent discrimination was useless unless the originating scent belonged to the missing person. As pointed out earlier, Constable Robertson's contemporaneous notes and supplementary reports do not mention the use of a sweater belonging to Christine.

Constable McGowan testified at the second trial that he saw Constable Robertson on the Jessop property on the night of October 3, 1984. He was aware Robertson's dog was there but he could not recall seeing the dog in the house. He gave contradictory evidence as to whether, in his presence, outside the Jessop residence, Robertson asked for a piece of clothing from the missing person for his dog. McGowan did not know whether Robertson found such a piece of clothing. McGowan further testified that he did not accompany Robertson to Christine Jessop's bedroom, nor did he point out or provide the sweater to him.

Constable Robertson said that he provided the blue sweater to his dog so that Ryder could obtain Christine Jessop's scent. He left the sweater at the command post in the trailer next to the fire hall between 4:00 and 4:30 a.m. on the 4th before returning to Newmarket. Again, there is no mention in his notes about turning in a sweater (or any other evidence) at the command post. Robertson maintained that he did not know that the police were searching in 1984 and 1985 for a blue hand-knit sweater.

According to Detective Raymond Bunce, oblivious to any claim by Robertson that he had in possession of Christine's blue sweater and had turned it in to the command post, officers made a number of attempts to locate this missing sweater; there were searches for it in the Jessop household; Bunce attended Christine's school on July 15, 1985, to see if the sweater had been left there; the sweater was also one of the items listed on the April 22, 1985 search warrant that was prepared for execution at the Morin home (Indeed, the blue sweater was even being sought at the home of another suspect, as reflected in another search warrant that was obtained.)

Despite these efforts, the blue sweater that Christine purportedly wore the day she disappeared was never seen again.

The defence suggested that Christine's clothing may have been removed in a place other than where her body was found, which raised questions as to whether she was abducted, taken straight to the body site and killed, or was taken captive and killed at a later time. The latter proposition was inconsistent with the Crown's theory of Mr. Morin's guilt. Accordingly, the defence believed that evidence surrounding the blue sweater was highly important. Constable Robertson's evidence not only bolstered the prosecution's case against Guy Paul Morin, it also tied up a potential loose end relating to the whereabouts of this sweater at the time of the murder.

Description of the Sweater

Counsel for the Morins allege that the evolution of Constable Robertson's memory of the description of the sweater demonstrates the effect of suggestive questioning by the Crown.

Robertson's August 30, 1989 will-say stated: "While at the Jessop residence, a sweater belonging to Christine was obtained for the dog."

Susan MacLean's notes of the November 1990 meeting indicate that "Robertson's dog [was] given smell of blue sweater."

In Ms. MacLean's March 4, 1991 list of issues of things to do, she noted: "Was P.C. Robertson YRPF given Christine's blue sweater to use with his tracking dog? Review this with Jessops [and Robertson]."

On July 30, 1991, at the pre-trial, Officer Robertson's evidence relating to the blue sweater was as follows:

> It was just a full sleeved sweater, it was blue, I think there was some other markings on it. From memory I can't recall exactly, but it was told to me by the investigating officer she had been wearing it that day ... it was a wool sweater I believe.

In August, 1991, during the pre-trial motion, Janet Jessop described the sweater in evidence as blue hand-knit sweater, zipper down the front, no collar, long sleeves, ribbed at the wrist and waist area.

Robertson's evidence at trial in November, 1991 relating to the description of the sweater was more detailed. He testified that he was taken to Christine's bedroom by McGowan who told him Christine had worn the sweater that day. (He also testified that he only learned of McGowan's name when he had met him at the court house a few days prior to giving evidence). Robertson described the sweater as a buttoned or zippered cardigan, medium blue in colour, wool, long-sleeved, child size, possibly hand-knit. In cross-examination he added that the sweater may have had a pattern, as he had testified at the pre-trial.

He was asked during the Inquiry if the evolution of his memory was a result of being briefed by someone on the description of the sweater. He replied that this concept was totally false and he categorically denied that he was fed any of this information by anyone on the prosecution team.

Ms. MacLean told the Inquiry that she accepted Constable Robertson's evidence regarding his activities on October 4th. She said that it was during the November 20, 1990 meeting that she first realized that Robertson may have used the blue sweater which Christine Jessop had reportedly worn on the day she disappeared. Constable Robertson was asked by Ms. MacLean if he could describe the sweater in his will-say:

> I remember - yes I do remember [the November 20, 1990] meeting, and I think that's where we first asked: Well can you tell us about the sweater? How did it look? and that's when he started describing it, and I remember it struck me as he described it that: Oh my goodness, this may well be sweater we've all been looking for.

Ms. MacLean testified that prior to Constable Robertson's pre-trial motion evidence, she asked him to describe the sweater in more detail, if possible. She did so, she said, so that Janet Jessop could establish whether the sweater used by Robertson belonged to her daughter. Ms. MacLean denied engaging in suggestive questioning in preparing Constable Robertson. While she could not recall her specific questions, she maintained that they were open-ended.

Robertson's Evidence of Dog Scent Discrimination

Constable Robertson said that after taking the blue sweater from

Christine's bedroom he went to the rear of his patrol car where he let Ryder smell it. No other officer was present when he 'introduced' this sweater to his dog. He testified that he then walked the dog over to Christine's bicycle and allowed Ryder to smell it. When the dog reacted positively, it indicated to him that Ryder had successfully detected Christine's scent on the bicycle. The conclusion was that Ryder was able to discriminate Christine Jessop's scent from an object. The detail about Christine's bicycle was not included in Robertson's notebook, nor in the supplementary reports which outlined his activities that evening. Nor was there any description of the location of Christine Jessop's bicycle in his will-say.

At the pre-trial motion, Robertson testified that the bicycle "was sitting right near the side door of the residence." But at trial his evidence was more consistent with that of other officers:

> I went around the house clockwise or counter-clockwise, I came to a shed and an open garage, carport. And I recall it being pointed out to me there was a bike in there laying on its side and that that was Christine Jessop's bike.

Ms. MacLean denied any suggestive questioning concerning the bike; however, she stated that she may have shown Constable Robertson photographs of Christine Jessop's bicycle lying on its side in order to ascertain whether it was consistent with the bike he had observed.

After receiving a positive reaction to the bicycle, Constable Robertson went to the Morin property. But, he testified, just before doing so, he put Ryder in his car and went with another officer to the Morins and asked that their dogs be contained inside their home. After being assured that this was done, he moved on to the Morin property with Ryder.

He testified that he searched this property with his dog by leading it around on its leash. As Constable Robertson and his dog got close to the right door area of a Honda, which was parked on the property, Ryder started sniffing in a very pronounced fashion, jumped up on the side of the car and put his front feet on the glass. The windows of the Honda were closed. To Constable Robertson, this signified the beginnings of a positive reaction on the part of his dog in detecting the scent of Christine Jessop, indicating to Robertson that Ryder had, detected the scent of Christine Jessop.

At the pre-trial motions, Robertson was queried as to what happened as he and his dog approached the Honda. He described the indications provided by his dog:

> He started from the driver's side of the vehicle around the front to the passenger side of the vehicle. Once there he made a positive reaction. When he is searching for something ... the dog under search might wag a tail if I say something to him, his ears are up, he's going about his business, not displaying anything, no sound from him, he is not to bark at any time. ... However, that changes when he finds something. He will bark, he will start to get excited, the tail is wagging. If somebody, something is behind something he can't get at, scratching at it, jumping against the door to a closet ... This type of reaction turning around, looking back to me like, "Hey get over here." ... *He started this reaction first of the tail, the becoming excited, the barking and the next thing I know he's right up on the side of this small light-coloured vehicle, on the passenger door. The windows were all up on both sides.* (Emphasis added.)

In Robertson's opinion this reaction meant that Christine Jessop had been in the car:

> At the time the dog had reacted positively to whatever he smelled within that car and if it was under training or practice conditions I expect what we would be finding to be sitting on the front seat of that vehicle. That's the reaction that I had detected, etc., from the dog and going at that vehicle. If it was a stage one, the person would be hiding in the vehicle, or the object you were looking [for] ... would be on the front seat of the vehicle.

At the Inquiry, however, he stated that Christine had been in *or at* the car.

Constable Robertson said that the occupants of the Morin household watched him through their front window while Ryder was at the vehicle. He could not see inside the vehicle, as he was several feet back from Ryder, who was on a three-metre leash. As Robertson moved closer to the car he was suddenly interrupted by a barking dog which he observed at the side door of

the residence, coming towards him. He stopped what he was doing, pulled Ryder away from the car, and shouted to another officer to 'get the Morin dog away.' Robertson then moved on to search elsewhere.

At trial, the Morins were emphatic that none of their dogs were allowed to run loose that evening, as they were aware that people were searching in the vicinity.

Robertson testified that when the dog was let out of the home, it interrupted his search (and his dog's activity). Robertson was asked why he did not do the logical thing and look inside the car:

> Q. And again, if, on your evidence your dog provided to you an accurate and reliable indication that Christine Jessop had been at or in that vehicle, wouldn't the first thing that you would have done is try the door, come up to the door, look into the car and see whether Christine Jessop is still in the vehicle? Wouldn't that be the most natural thing to do if your dog indeed had positively reacted to the car in the way you described?
>
> A. I guess, but at the time, with the other dog coming out, in the position that I was in, the best of my memory is that I pulled the dog back from the area to secure it, and to request that the other dog be secured.

He further stated, by way of explanation:

> I was up there looking for a missing girl, I was using my own dog to do that, and the action that I took after the reaction at the vehicle was to go and assure that these houses and vehicles would be properly checked.

Constable Robertson said that while he told a sergeant at the Jessop house that evening that the houses and vehicles on the properties surrounding the Jessop residence should be properly searched if they had not already been. He was uncertain of the identity of this officer, nor did he make any notes of his request. He identified the sergeant he spoke to in this regard as either Sergeant Gordon LeMoine or Sergeant Alex Low. He did not know if he had gone into any more detail with this person. Robertson believed he had told other officer(s) of Ryder's reaction to the Morin Honda, but he did not know who.

Sergeant Low, who had testified prior to Robertson during the trial, had not been asked about his involvement with Constable Robertson that evening. Accordingly, the defence brought a motion to regarding-open its cross-examination of Sergeant Low. Over Crown counsel's objection, the defence was permitted to do so, but Sergeant Low had no recollection of seeing Robertson on October 4th.

Sergeant LeMoine was not called as a witness at the trial, but his October 4, 1984 supplementary report said this:

> P.C. Robertson assisted in the search of the immediate area, using his german shepherd which he is training for police use. A thorough search of immediate buildings and parks etc. was made. Due to the amount of searchers in the area prior to the dogs arrival, no scent was available. P.C. McHardy assisted P.C. Robertson with this detail.

No other officers had any recollection of Robertson relaying such information to them.

Officer Robertson testified that a trained dog can follow a scent path left behind from a person. This is 'tracking'. Tracking could not be done here, due to the contamination of the scene. He indicated that a trained dog can 'scent discriminate', that is, the dog can look for a particular scent provided by, for example, a person's clothing. Finally, dogs can be used in the searches for humans (for example, after an avalanche) without a track and without a scent object, simply because dogs can assist in scenting a human (i.e. any human's) presence. The latter was what Robertson and his dog later did in Queensville. However, Robertson denied that he and his dog were only involved in the latter kind of assistance throughout; he could not explain Sergeant LeMoine's report, and did not recall telling either Sergeant LeMoine or Sergeant Low that his dog would be trying to scent discriminate.

It did not concern Ms. MacLean that Constable Robertson did not open the car door or further investigate, following the reaction from his dog. She said that had the case been a homicide investigation at that point in time, the failure to search the car would have concerned her, but she accepted Robertson's explanation that a missing person search was a different matter. At no time did Constable Robertson tell her or testify, as he did at the Inquiry, that Christine Jessop had either been in *or at* the car, the latter being a

significantly different matter.

At the Inquiry, Constable Robertson justified not reporting Ryder's reactions to the bicycle and the car in his notes and in the supplementary reports as follows:

> Because I didn't place a great importance to those two reactions, as I had just said, because of the proximity they were to where the girl lived, played or - because we were there so close with these residents, and I didn't know who was in the residences, who the vehicles belonged to. My assumption was that there was nothing alarming, it's nothing obviously noteworthy.

When asked whether it occurred to him to have promptly documented that his dog had given him an accurate and reliable indication that Christine Jessop had been in or at the vehicle, he replied: "No, I don't believe it did, because I don't believe that there was an importance to me about it. I was, after all, searching for a missing girl." *Whether or not the search was part of a homicide investigation or a search for a missing person, Robertson should have conducted a thorough search of the Honda, or ensured this was done if the events he described truly occurred.*

Robertson testified that after he finished his search, he spoke with Inspector Wilson at the fire hall. He did not, however, mention Ryder's reaction at the Honda; nor did he seem to tell any other officer about the dog's reaction until some five years after the event. Inspector Wilson testified that he did not know anything about Robertson's (and McGowan's — described later) purported observations until years later. He testified that he was shocked and disappointed to learn that information relating to activities on October 3 and 4, 1984, was provided for the first time in 1989.

It is curious that Robertson would not have told Inspector Wilson, the most senior officer he came into contact with during the search, or anybody else, about the dog's reaction to Christine Jessop's bike and to the Honda, had this, in fact, occurred.

Robertson's Evidence of the Morins' Demeanour

The will-says of three officers reflected material bearing adversely

upon the Morins, none of which was contained in contemporaneous notes or reports. These will-says, produced many years afterwards, expressed the sentiment that the Morins were either unaccommodating or unwelcoming to the officers visiting their residence.

Constable Robertson's will-say reads:

> My view was that these people [the Morins] (I observed a male and a female) were not very accommodating for being neighbours and the nature of the search.

Similarly, Constable McGowan's will-say reflected his observation that "I was not made welcome nor offered any assistance [by the Morins]. I felt this strange for an immediate neighbour." (Constable McGowan's late-breaking information is discussed later.)

The will-say of Constable McHardy also states

> I don't believe that I had any conversation with the occupants of the house to the North of the Jessop residence. I recall that there was some conversation, and I remember feeling that we were not welcome on this property.

It is noteworthy that Constable Raymond Bunce's original will-say prepared for the first trial states that upon attending at the Morin residence

> a request was made to search the residence. ["Mr. Morin"] advised that we were not welcome into the residence, he had searched the residence and he would in fact search the residence again.

Police notebooks do not record all those present at the August 16, 1989 meeting. Officers Bunce, McGowan and Robertson all attended the November 20, 1990 meeting. Officer McHardy is recorded as attending a meeting November 19, 1990.

Constable Robertson testified at the Inquiry that the first time he was ever aware of Constable McGowan's evidence relating to the demeanor and attitude of the Morins was at this Inquiry. McGowan's evidence is outlined, later in this Report.

Testimony Challenging Constable Robertson

Peter Payne

At the second trial, defence counsel called Peter Payne, a retired R.C.M.P. officer, to refute the evidence of Constable Robertson. According to R.C.M.P. records, Robertson had never been assigned to any duties relating to the handling of police service dogs. Contrary to his testimony that he worked closely and frequently with Mr. Payne, this officer had no recollection of working with Robertson. Indeed, he had no memory of ever meeting Robertson, and he also contradicted much of his other evidence:

> Q. [Pinkofsky]: To your knowledge, did you ever work with any officer in the R.C.M.P. named David Nell (sic) Robertson, Dave Robertson or anything like that?
>
> A. I can't recall the name.
>
> Q. Insofar as your becoming a dog master, did you utilize officers to assist you as quarry the same way you were quarrying the first part of your career in dog work?
>
> A. Yes, I did.
>
> Q. Have you ever recommended any police officers who acted as a quarry to you, to sort of recommend that he should go on to become a dog master?
>
> A. I can only recall one that I recommended who subsequently did become a dog master, and that was in Nanaimo, British Columbia.
>
> Q. And was his name David Robertson, David Nell (sic) Robertson, or anything like that?
>
> A. No it wasn't.
>
> .....
>
> Q. Have you ever used any dog named Jessie owned by another officer, regardless of who it was?
>
> A. No.

> Q. Have you ever used dogs privately-owned by any individual an R.C.M.P. case work?
>
> A. No.
>
> Q. Would you have ever used a female Shephard in R.C.M.P. case work?
>
> A. No.

He further testified that he would never use another handler's dog, even if it was an official R.C.M.P. dog, as he would not be sufficiently familiar with the animal to interpret its indications. This, again, was in complete contrast to Robertson's testimony as to his dealings with Payne. However, Mr. Payne did recall that his own dog had been sickly for about a year. He also recalled being involved in two searches which Robertson also described; one involved a search for inmates in a 'jail break' in which Payne used his own dog, and one followed the shooting of two police officers in Prince Albert. With regard to the former, Robertson said his dog, Jesse, had been used and with regard to the latter, Robertson said he had worked with a dog handler who replaced Payne when he left the Regina detachment.

Albert Boley

Albert Boley testified at Mr. Morin's trial for the defence and also during the Inquiry. He is a former staff sergeant who was in charge of the Ontario Provincial Police canine division from 1965 to 1988. He was a member of the U.S. Police Canine Association. He presented seminars on the subject, had been involved in over 3,000 police investigations in which dogs were used and had trained 100 dogs and 320 OPP officers in police dog work. He has also participated in studies with forensic climatologists examining scent and wind patterns and humidity relative to the location and duration of scent. Mr. Boley had impressive credentials in relation to the training and handling of dogs and their use in criminal investigations.

In November 1991 Mr. Boley learned through the media that a dog handler (Constable Robertson) had placed Christine Jessop in Morin's vehicle based upon scent discrimination. His knowledge and training told him this was not possible in such circumstances. Accordingly, on November 21, 1991, he called the Crown attorney's office in London and left a message with his opinion on the nature of this evidence. He was assured by a local

Crown attorney that someone from the Durham office would get back to him. Neither Ms. MacLean nor Mr. McGuigan could recall receiving a message that Mr. Boley had called. A number of days went by.

When no one returned his call, he telephoned Mr. Pinkofsky's office in Toronto and expressed his concern about the nature of this evidence. Mr. Boley read transcripts of Constable Robertson's evidence and was impressed neither with Robertson's purported training as a dog handler, nor with his claims of Ryder's skills.

Mr. Boley testified that preparing a dog for work of this nature involves intense training. He said Ryder was simply not old enough to have received sufficient training to qualify him in tracking and scent discrimination. To refine a dog's training in these areas would take 18 to 30 months. Ryder had four to eight months' training at best.

Ryder's age was an issue at the second trial. Constable Robertson's evidence at trial and at the Inquiry was that Ryder was fifteen months old when he purchased him in January or February, 1984 and that at the time of Christine Jessop's disappearance he was just under two years old. At the pre-trial he testified that he based his belief in this regard on the Canadian Kennel Club registration which he had received upon purchase. At trial, evidence was called relevant to this issue. Canadian Kennel Club records were filed; a certificate of registration indicating that Ryder was born February 18, 1983 and another indicating that ownership had been transferred to Robertson on June 3, 1984. These documents suggested that Constable Robertson obtained Ryder only four months before Christine Jessop disappeared and that Ryder was 20 months old at the time of his search discrimination work in the Jessop case. At the Inquiry, Constable Robertson stated that, in fact, he had not seen these certificates when he purchased Ryder. While at some point he received the documents from the Kennel Club, he passed them on to Ryder's new owner. Someone told him Ryder's age when he purchased him.

Mr. Boley considered Ryder's reaction at Christine's bicycle and at the Morin car to be virtually meaningless. Boley's evidence was that a dog's reaction could be, at best, an investigative tool, but did not permit the conclusions drawn by Robertson. He was emphatic that any reaction by Ryder to Christine's bicycle or the Morin Honda could not be interpreted as an accurate and reliable indication that she had been in or at the car. He gave this opinion based on the dog's training and the particular circumstances of this

case, as well as the general limitations of drawing conclusions from the reactions of dogs. Boley testified that even the best-trained trainer with the best-trained dog would never feel confident testifying in a criminal court with accuracy and reliability that the dog had correctly pointed out the guilty party based upon scent.

The following exchange took place at the Inquiry:

> Q. If you've got a reliable dog, and it gives a positive identification that positive identification, is useful to you as the handler, because you're going to accept that it's reliable to a certain degree, and that it would be useful for you to do things as a result of that?
>
> A. It would be as useful to you as would a flashlight be useful to you, nothing more than that. You can't take it to the next step and say: Christine Jessop was in that car or around that car. You cannot say that with any degree of reliability because there are too many things. If you have the best dog in the world and the best handler, if he says that, then he's wrong.

I accept Mr. Boley's evidence. It is also commendable that he, a long-time police officer, would initiate a telephone call to correct what he perceived to be overstated evidence by another police officer. He did not know whether Guy Paul Morin was guilty or innocent — that was not the point. Mr. Boley's attitude was refreshing.

I do not take from his evidence that dogs are incapable of using an article to 'scent discriminate.' His evidence is not as definitive in that regard as that of Mr. Hoelcher who testified at the pre-trial motion. At trial, he agreed with Ms. MacLean (who put certain writings to him) that trained dogs can do some remarkable things. A trained dog can lead an investigator to drugs, explosives or to a person. His point was that, in the absence of finding those drugs, explosives or the person, one could never rely upon the dog's indications as proof that they were once there. One example made the point well:

> A. Well, the dog could make a mistake. He could be indicating on something that was there. He could be indicating on something that never was there, it's just that they're too many — ... like with an explosive detector dog, if in fact we got a call that there was an

> explosive in this room and I brought a dog in and searched it ... Dog indicates no explosive [on the suspect briefcase] , I'm not about to go over and kick the briefcase, you know what I mean?

Opinion of the Investigators

Detective Fitzpatrick recalled a conversation with Inspector Shephard in which concerns were expressed concerning the reliability of Robertson's evidence, given the timing of the disclosure of this evidence and his failure to record his observations until some years after the event. Nevertheless, the officers took no steps to check out this evidence. Although Fitzpatrick could not recall doing so, he assumed that he or his partner would have attempted to verify Constable Robertson's account of turning the blue sweater over to the command post.

Inspector Shephard testified that he had no reason to disbelieve Constable Robertson. Shephard was questioned during the Inquiry and said that he was aware of the following factors:

- that no contemporaneous notes had been made of the dog's reactions to the bike and vehicle whereas Robertson did make detailed notes on insignificant matters;
- that he alerted no one at the time to the actions of his dog, considering the potential significance of those actions;
- that he took no follow-up steps personally, such as checking the door of the vehicle;
- that, at the highest, he merely told a superior that all properties in the area should be searched.

Inspector Shephard acknowledged that, in retrospect, he should have been concerned about all of those circumstances. But he also agreed with Crown counsel's submission in closing to the jury that the 'dog evidence' took on much greater significance in light of the cumulative effect of the other evidence connecting the Honda to the crime.

He candidly agreed with the suggestion that, unconsciously, he probably accepted Constable Robertson's evidence somewhat uncritically because it conformed to his view, at the time, that Guy Paul Morin was guilty. He acknowledged that he did not critically analyse Robertson's recollection in the same manner as he analysed the evidence supporting Mr. Morin's innocence. (For example, see the later discussion on the investigator's approach to Frank Devine's recollection.)

Inspector Shephard could not recall discussions with Crown counsel where concerns were expressed about the indicia of unreliability surrounding Robertson's evidence; nor did he recall any Crown attorney or police officer voicing a reservation about calling Constable Robertson; nor was he ever instructed to further investigate the facts alleged by Robertson.

Crown's Use of the Dog Evidence

The position of the prosecution relating to the evidence of Constable Robertson is succinctly set out in its factum on the appeal:

> Further, it is a position of the Crown that *regardless* of whether or not the trial testimony of Constable Robertson was properly admissible as *expert evidence*, with respect to the issue of "scent discrimination," there can be little doubt that the evidence was properly admissible, in any event, to show *consciousness of guilt* on the part of the *Appellant* and his *parents*. More specifically, it is submitted that the trial judge was bound to admit this evidence if for no other purpose than to show how the members of the Morin family *reacted* when they saw Ryder "react" positively at the passenger side of the Morin Honda. It was *reasonably open* to the jury to infer, from the fact that the Morins *immediately released their own dogs* from the house as soon as this happened, thereby effectively and hastily bringing the police search of their property and, in particular, the Honda, to a screeching *halt*, that they did this because they *knew* that Christine Jessop had been *in that car that very day*, and they wanted to inhibit the police from taking any further steps *in their investigation of the vehicle*. In short, releasing their dogs to interrupt the police search just as Ryder "reacted" at the Honda, was a *deliberate act* of *obstructing* the police investigation so as to effectively *conceal* any potential evidence that the police might

> find in and around the car shedding light on the murder of Christine Jessop. (Emphasis included in the original factum.)

Mr. McGuigan invited the jury to infer from Robertson's evidence that Christine Jessop had been in the Morin Honda. This was, of course, in contrast to Mr. Morin's testimony that Christine had never been inside that car. The dog evidence, as it came to be known, attained a prominent place in the trial and was extensively referred to in closing arguments and in the trial judge's charge to the jury. The address of Crown counsel relating to Constable Robertson's evidence covered 36 transcript pages. The trial judge's charge to the jury on the same subject covered 27 pages. Mr. McGuigan's closing address to the jury included the following passages:

> If you accept Constable Robertson's evidence, somebody let the dog out. Only three people in that home and if it's the accused, if you find that, that the accused is the person who released the dog at that time, I submit to you that that is evidence that is capable of being evidence of consciousness of guilt.
>
> .....
>
> Ladies and gentlemen, I submit to you that the reason that Constable Robertson's dog reacted at the accused's vehicle, that Honda vehicle, in the early morning hours of October 4th, was because the accused had driven Christine Jessop to her death in that vehicle on October 3rd, '84.
>
> I respectfully submit that this dog evidence, if I can refer to it as that, takes on much greater significance in the light of all the other circumstantial evidence connecting the accused's car to this crime. That is, the hairs, the fibres, the blood and the reaction that Paddy Hester got from the accused when she tried to search the same vehicle and the same door.

When Crown attorney Alex Mr. Smith testified early in the Inquiry, he was questioned about the reasons for his belief that Mr. Morin was guilty. He replied that, among others,

> [t]here was evidence that the dog — if I remember correctly, the officer's name was Robertson, the police

> dog was alerting or whatever one calls it, at the Honda motor vehicle when a Morin dog was let out of the house.

Mr. Gover gave his opinion that the evidence of Constable Robertson likely strengthened the prospect of conviction. In his view, however, the reliability of this evidence was affected by the fact that Robertson did not come forward earlier or make a note of it in his contemporaneous documents.

Ms. MacLean was asked during the Inquiry about her opinion as to the veracity of Robertson's evidence. Although she was unsure as to the weight the jury would place on his testimony (which Ms. MacLean viewed as one of the more peripheral pieces of evidence), she was not concerned about its veracity:

> As much as I was troubled by some of the things about Robertson, I don't think he was lying, I think he honestly believed what he said, and I felt it was still open to the jury to consider his evidence.

Ms. MacLean was not concerned that Mr. Payne did not remember Robertson despite the latter's testimony that he and Payne had worked together for a length of time. In terms of the absence of a contemporaneous record of Robertson's testimony, Ms. MacLean testified that while she wondered why he had not previously recorded his dog's activities, it was not surprising to her, given her experience where police officers sometimes did not even record statements made by an accused in their notebooks. She added that many officers involved in the York Regional investigation had not made notes. In assessing whether Constable Robertson was truthful about the dogs being let out of the Morin residence, Ms. MacLean considered the fact that Ms. Hester also stated that she was chased away from the car by dogs (this is discussed in more detail later in this section). Robertson's claim that the dogs were let out the moment Ryder reacted at the Honda was, in Ms. MacLean's opinion, as significant as Robertson's evidence concerning his dog's reaction because everything in the case pointed toward the car.

Mr. McGuigan testified that at the time of the second trial he believed dog scent discrimination evidence was reliable. The timing of Constable Robertson's evidence, and the lack of a contemporaneous recording, were the only two matters which caused him some scepticism about Robertson's reliability. He said that while one always has to have concerns about late

evidence, he had his faith in the credibility of police officers, absent an indication to the contrary. Mr. McGuigan thought that too much emphasis was placed on the notebook omission and Robertson's failure to suggest the Honda be searched, in light of the fact that this was not yet a homicide investigation. In Mr. McGuigan's opinion, the absence of confirmation from Sergeant Low or Constable Robertson's partner was not determinative. Robertson's stated experience in the field was uncontradicted at the time he was prepared by Ms. MacLean and he, McGuigan, believed that the evidence of Mr. Payne was not determinative. Mr. McGuigan added that, on the basis of Robertson's evidence in-chief, he was of the view that the dog was trained.

Findings

Officer Robertson testified at the second trial that his dog, using the scent of the blue sweater given to him from Christine Jessop's bedroom, indicated that Christine Jessop had been in the Morin Honda. Though Officer Robertson left the impression during the Inquiry that he was expressing the opinion only that Christine Jessop had been in *or at* the Honda, there are suggestions to the contrary in the trial evidence. (Like certain other witnesses at this Inquiry, Robertson's testimony sought to minimize the inculpatory thrust of his trial evidence somewhat.) Robertson further testified that the homeowners let out the dogs, preventing Ryder from further exploring the property.

On the totality of the evidence, I find Officer Robertson's account to be implausible. There is no record or recollection of anyone that the blue sweater was provided to Robertson. Everyone was searching for the blue sweater for months thereafter, including his fellow officers. It was Robertson's evidence that not only was the sweater in open view in Christine's bedroom, but he returned it to the York Regional officers at the command post for the investigation. No one confirms that Robertson 'introduced' any blue sweater to his dog. There is no suggestion that his partner that night, his supervising officers or anyone else knew that he had introduced this sweater to the dog, or that the dog had detected anything at the Morin property. It is untenable that Robertson would take no action, even during a missing person investigation, to search the vehicle or even try the door of the vehicle where Christine's scent was purportedly detected. It is inconceivable that he would tell no one to search *that specific vehicle.*

He has notes and supplementary reports made at the very time of the

events or shortly thereafter, documenting the most minute details of the objects and locations searched. It is inconceivable, on his version of events, that there would be no mention of the Morin vehicle, the dog's indications, the homeowners' behaviour or the use of the sweater as a scent object. Indeed, the contemporaneous records make it appear that his dog was not tracking and was not using a scent object, but merely assisting the search by looking out for any detectable human scents. Robertson also has no explanation for LeMoine's entry.

Then, Guy Paul Morin, Christine Jessop's neighbour, is arrested. Robertson does not tell his fellow officers that his dog detected Christine Jessop's scent in the neighbour's Honda, though he is still a York Regional Police officer and the case assumed unparalleled importance in the York Region community.

Guy Paul Morin is prosecuted for murder. Robertson tells no one in authority during the currency of the first trial about his purported evidence.

His claim only comes forth after Guy Paul Morin has been acquitted and is facing a new trial. It only comes forth in the context of a meeting which explores the officers' potential relevance at a second trial.

The evidence as to the age of Ryder, Robertson's real opportunity to train him and as to Robertson's lack of any memorable relationship with Peter Payne further undermines his credibility. I find that Robertson exaggerated the extent of his training and the extent of any relationship with Peter Payne.

Objectively viewed, there were very significant problems with what Robertson had to say. Brian Gover recognized these problems at the time. However, I accept that Susan MacLean, who tendered Officer Robertson as a witness, did believe that Robertson had credibility, primarily due to her overall view of Morin's guilt and her confidence in the forensic evidence purportedly supporting Christine Jessop's connection to the Morin Honda.

Some might infer from my finding in relation to Robertson (particularly since the *indicia* of unreliability were largely known by the prosecutors at the time) that they chose to call this evidence which they knew to be false or, at least, highly suspect. (I refer only to the three prosecutors at the second trial here, not Mr. Gover or Mr. Scott.) However, as I earlier

said in the context of the jailhouse informants, the prosecutors' views were no doubt coloured by their firm belief in Morin's guilt. Perhaps this made certain witnesses look better to them than they were; this also made it easier to discard evidence which undermined their own witnesses and to look upon largely inconsequential evidence as confirmatory. On the other hand, some or all of the prosecutors may, like Mr. Gover, have had a greater appreciation of the significant problems with their witnesses' credibility. However, the prosecutors determined that the assessment of admissibility was for the trial judge and ultimate weight was for the jury. No law or ethical standards existed that prevented them from calling somewhat suspect evidence, so long as they did not *know* that the evidence was false.

I do accept that the prosecutors did not call evidence which they *knew* to be false. Of course, from a systemic point of view, this offers cold comfort to Guy Paul Morin or to others who may be charged with crimes they did not commit. The important systemic issues raised are addressed later in this Report.

It would also be erroneous on my part to assume that each prosecutor thought the same way. Frankly, I would expect that Mr. McGuigan over the years had acquired a seasoned appreciation of the quality of evidence; indeed, as Mr. Gover conceded, Mr. McGuigan has a great deal more trial experience than Mr. Gover or, for that matter, most everyone else in the system. As a result, unlike Susan MacLean perhaps (that is, back then), he might have seen much of the suspect evidence for what it was, unless all of his assessments were impaired by the tunnel vision I earlier described.

The bottom line is this: Mr. McGuigan, Mr. Smith and Ms. MacLean failed to *objectively* assess the reliability of evidence which favoured the prosecution. It is difficult to determine the precise extent to which each of the prosecutors appreciated just how unreliable some of the evidence tendered was. I accept that Ms. MacLean genuinely believed in the credibility of much or all of the suspect evidence called by the prosecution, and in particular, Robertson's evidence. Her evidence at the Inquiry makes it clear to me that her eyes have been opened wide by the revelations here, and that she will be far more cognizant of the dangers of tunnel vision and a loss of objectivity in the future. It is sometimes difficult to assess just how insightful the far more experienced Mr. McGuigan was about the quality of the evidence being tendered. Mr. Smith's precise state of mind is also difficult to assess. He, like Susan MacLean, was far less experienced than Mr. McGuigan. However, his

outlook, in some respects, was far more closely aligned to Mr. McGuigan's than that of Susan MacLean.

Having found that each of these prosecutors failed to objectively assess their own evidence at times and, on the other hand, that they did not call evidence they knew to be false, I do not believe that their precise state of mind as to each and every witness called is of great assistance in addressing the issues at this Inquiry. I do return to the issue of their state of mind, to some extent, in the context of other contentious witnesses, as is necessary.

In any event, the prosecutors did not see it as their function to assess the reliability of this evidence. Mr. McGuigan was not exercising any prosecutorial discretion to decline to tender unreliable evidence. Evidence was evaluated on the basis of whether it would tactically advance the Crown's case or could backfire, and redound to the Crown's disadvantage. If the jury might accept it, and it was admissible, it would be tendered.

Counsel for Guy Paul Morin has alleged that the 'development' of Robertson's evidence about the blue sweater, given Ms. MacLean's notes, was orchestrated by Ms. MacLean. It is also alleged that the collective meetings to which Robertson was a party played a role in the formation of his evidence.

I have no doubt that some of the witnesses who testified at the second trial owe the 'improvement' in their recollections to the way or ways in which their evidence was obtained: collective meetings where evidence was discussed; suggestive questioning by investigators; discussions between fellow officers; overly informative questioning by prosecutors in their extensive preparation of witnesses and, I regret to say, at times outright falsehoods calculated by certain witnesses to advance the Crown's case or dull the defence's point of attack. (My mandate does not permit me to make findings that named persons deliberately lied; I have not done so and my findings, particularly those as to the *unreliability* of witnesses, must be seen in that light.) However, I can say this: I do *not* find (as has been alleged here) that Mr. McGuigan, Mr. Smith or Ms. MacLean deliberately counselled perjured evidence or deliberately 'fed' witnesses with details, not known to those witnesses to cause them to regurgitate those details as their own. (I earlier made a similar finding in relation to the 'body site' evidence.)

I specifically accept Ms. MacLean's evidence that she did not

deliberately 'feed' Robertson with details about the blue sweater. Their failing was that they did not take adequate care to ensure that their interviewing process did not contaminate witnesses. The prosecutors showed little or no introspection about these contaminating influences upon witnesses for two reasons: one, the evidence favoured the prosecution; this coloured their objectivity; two, their relationship with the police which, at times, blinded them, and prevented them from objectively and accurately assessing the reliability of the police officers who testified for the prosecution. This is a recurrent theme throughout this, and other chapters. In this context, I speak of the three prosecutors generally. I appreciate that each is entitled, where possible, to separate treatment by me. However, many of their interviews were done with all three present. Mr. McGuigan is shown in police notes to be present for many of these interviews, even when conducted by the others. He indicated that this may be reflective only of his presence in his own hotel room, where interviews were conducted. He also indicated that the other prosecutors were fully capable and given significant independence in dealing with their own witnesses. Frankly, Ms. MacLean's perspective at this Inquiry was, to some extent, different. She perhaps saw Mr. McGuigan's role as more substantial. Everyone agreed that as the lead counsel, Mr. McGuigan had the ultimate deciding voice on issues. I have no doubt that Mr. McGuigan's influence (and I do not use the term 'influence' in a pejorative way) pervaded the exercise of discretion in the prosecution case.

What this means is that the other prosecutors took their lead, in most respects, from the approach and mind-set of Mr. McGuigan.

Apart from Robertson's credibility, I have serious concerns about the admissibility of evidence as to the dog's 'indications' that Christine Jessop had been in the Morin Honda. My later recommendations address this issue.

Evidence that an accused attempted to divert an investigation may, under certain circumstances, constitute evidence of consciousness of guilt. Even apart from Robertson's credibility, it is debatable whether his evidence was sufficient to permit that inference to be left with the jury. It is unnecessary for me to decide the point, given my findings and given my view, elsewhere expressed, that a number of other items of 'consciousness of guilt' or 'unusual conduct or demeanour' ought not to have been left with the jury on that basis.

(ii) Constable Rick McGowan

Overview

Constable McGowan was not called to give evidence during Mr. Morin's first trial. During the second trial, however, he testified that on the night of October 3, 1984, he left the Jessop household only once during the course of the evening: at approximately 8:18 p.m. he went to the Morin household to speak with the neighbours. He walked up to the front door where he was greeted by Ida Morin. While he was asking her questions, he observed a side profile of a person who appeared to be looking straight ahead. He never thought about this until he saw the news report of Guy Paul Morin's arrest on television. The picture of Mr. Morin triggered the memory of what he had witnessed at the Morin house that evening. He was "astonished," he said, to see that Mr. Morin was the person who had been sitting in the chair, seemingly unconcerned about his questions relating to the missing child.

This is what he said, in part at the second trial:

> Q. While you were having this conversation with Mrs. Morin what was the accused doing?
>
> A. He sat there, just looking straight ahead and didn't turn his head to look at me or get in on the gist of the conversation that I was having with his mother. He just seemed to sit there looking straight ahead.
>
> Q. Can you give us your best estimate as to how long the conversation conducted with Mr. Morin took?
>
> A. It was brief. It was brief. It didn't seem to be assisting me with any information I was getting in response to my questions so I just left it at that. I went back to the Jessop house.
>
> Q. When you say "brief", could you give an estimate at all?
>
> A. A minute maybe.
>
> Q. Through that minute you were at the front door, did you see any reaction from Guy Paul Morin at all?
>
> A. None.

In re-examination he was asked this question:

> Q. Can I ask you how clear your present recollection is as to the accused Guy Paul Morin looking ahead when you were speaking to his mother?
>
> A. It's about as clear as the day that I saw the picture on TV and it just flashed in my mind what had happened.

Despite his clear recollection of Mr. Morin's demeanor, Constable McGowan had little memory of other matters relating to his visit to the Morin property. For instance, he could not recall the lighting near the house, the nature of construction work on the premises, nor his approach to the property.

When Ida Morin answered the door, he asked her a number of questions about Christine Jessop and received "basic yes/no answers." In his evidence at the Inquiry, Constable McGowan said that his testimony set out above ("it didn't seem to be assisting me with any information I was getting in response to my questions") was not meant to reflect negatively on Ms. Morin.

Ms. Morin was emphatic that no police officer spoke with her on the evening of October 3, 1984. She had no recollection of Constable McGowan coming to her house. Guy Paul Morin, too, had no memory of Constable McGowan coming to the door that evening. During his cross-examination he conceded that it might have been possible that he was watching TV when the constable knocked on the door. He also hypothesized that he may have been having his supper and did not pay any attention to him because he did not hear him knocking at the door — if, in fact, Constable McGowan came to the house that evening.

Events Leading Up To Constable McGowan's Testimony

Constable McGowan said that he was aware at the outset that the disappearance of Christine Jessop could result in a major missing persons investigation. He therefore carefully prepared detailed notes while sitting at the kitchen table in the Jessop home that evening. While he tried not to leave out anything of importance, there is no mention, in his notes, of his leaving the Jessop premises to go to the Morin home to speak with the neighbours.

Constable McGowan wrote four reports in October, 1984 regarding the events of October 3, 1984. Again, there is no mention anywhere of his attendance at the Morin household, nor of his observations there. He testified during the second trial that he took the case seriously and noted anything of significance, as he knew that his reports and notes could later be used by detectives who might follow up on their contents.

Meetings with the Crown

I have already referred to the August 16, 1989 and November 20, 1989 meetings held at the York Regional Police offices, attended by York Regional and Durham officers, and Crown counsel. Constable McGowan was present for both meetings.

On the day following this first scheduled meeting, August 17, 1989, there is a reference in McGowan's notebook to preparing paperwork on the Jessop case which, he testified, referred to the preparation of another will-say of his activities. This will-say prepared after the meeting included the following passage: "The Morin family was not welcoming, nor was it cooperative. Guy Paul Morin was staring straight ahead at the television." *Again, I find this to be a derogatory comment meant to reflect negatively on the Morins.*

Constable McGowan also attended the November 20, 1990 meeting with Crown attorneys. While McGowan had no recollection of whether in either of these meetings he mentioned seeing Mr. Morin, Detective Fitzpatrick said that he first learned of McGowan's evidence about his visit to the Morins during the November 20th meeting. While Fitzpatrick had some reservations about the late disclosure of such evidence, he did not recall discussing his concerns with his partner, but assumed that he probably spoke about this fact with Inspector Shephard or a Crown attorney.

The Will-Say Statements

According to the evidence, three will-say statements were prepared of the anticipated evidence of McGowan. He was vigorously cross-examined by Jack Pinkofsky on his previous will-say statements to show that his evidence relating to the Morin household and Guy Paul Morin's demeanor was a recent fabrication evolving with time. Accordingly, his various will-say statements were provided to him at trial to demonstrate that his memory had

improved insofar as detail was concerned and to obtain his explanation for this. More important, Mr. Pinkofsky challenged the witness' credibility on the basis that the information concerning Guy Paul Morin's demeanor was not recorded until 1989. McGowan conceded to Mr. Pinkofsky that he had never recorded his observations of Guy Paul Morin in any will-say statement until 1989. (He has resigned from this concession at this Inquiry.) His explanation to Mr. Pinkofsky was that, although the references to Morin were not drafted until 1989, this was not a new or recently fabricated story. In making reference to Constable McGowan's first statement, Mr. Pinkofsky asked the following questions:

> Q. When your memory was the best and the freshest, there isn't one word in your statement about Guy Paul, how did you put it, sitting staring, staring, staring straight ahead, is that how you put it?
>
> A. Looking directly ahead.
>
> Q. Looking directly ahead. Not one word about that is there?
>
> A. No.

Constable McGowan's story about his will-say statements at the Inquiry differed vastly from his evidence at the stay proceedings or the second trial. He told us that his *1985* will-say was a very detailed document which did set out his conversation with Ms. Morin and his observations about Guy Paul Morin's demeanor that evening. He stated that an *unidentified person* took this will-say and, for consistency purposes, retyped it on a legal-size sheet to conform with the format used by Crown counsel. The content of this sheet was considerably more concise than that which McGowan claimed, during the Inquiry, was his first will-say document and was, therefore, devoid of the detail he claimed he had included in his first will-say about Guy Paul Morin's demeanor. Constable McGowan was at a loss to explain why, if this explanation was correct, this second will-say, which was prepared by another person, added information not contained in the document that McGowan states was his first detailed will-say. For example, this 'second' document (which McGowan referred to as his second will-say) included details that the Morins purportedly told him about their dog barking and hearing a bus stop out front when Christine got home after school. This was not information that could have been gleaned from the document that Mr. McGowan says was utilized as the source document for this revised will-say.

Constable McGowan said that some time later he was told that his will-say was misplaced, necessitating a new statement. Curiously, Constable McGowan told the Inquiry that he prepared his new will-say by using and copying out the former will-say in his name, that is, the one he claimed had been prepared by the unidentified officer from Durham. He explained that this was the reason that the 'third' will-say was not as detailed as his 'first' and had errors; he incorporated these errors while copying it.

At this Inquiry, Constable McGowan testified that it was only when he was driving home from the second trial that it occurred to him there was a simple explanation for the variance in detail of his will-says. He claimed that he pulled over to the side of the road on Highway 401, took out all his will-says and analysed them. As mentioned above, questions had been put to him during cross-examination why his first will-say had no detailed information relating to Mr. Morin's demeanour. It was only when he analysed these will-says at the side of the road, he told the Inquiry, that he realized that the very detailed statement which the Crown, the defence, and he, had believed was his last statement, was, in fact, his first statement. He testified that the will-say statements had been regarding-arranged and the defence had been referring to the statements out of order during the pre-trial proceedings and the trial. His counsel summarized McGowan's position as follows:

> If there was any miscommunication or misinterpretation of the evidence, it was by the defence counsel for Guy Paul Morin, Mr. Pinkofsky. Throughout his testimony, defence counsel was very aggressive and harsh in his cross examination. McGowan could not understand that harsh treatment by Pinkofsky or the confusion over his will say statements, and testified only to what he knew. While he was on the stand, McGowan did not understand the commotion that defence was making over his statements nor was he able to clarify the situation, he could not understand why he was being "reamed out and called a liar."
>
> Due to the harsh treatment by defence, McGowan was eager to leave the courthouse as soon as he had completed his testimony. He was astonished by the abusive treatment of defence counsel. He wanted to put the entire case behind him.
>
> On the drive home, McGowan continued to be disturbed about defence counsel's confusion over the will say statements. He pulled over to the side of the

> road and took the statements out of the car. He soon discovered the basis of the confusion.[25]

An analysis of his evidence at trial discloses that Constable McGowan was specifically directed on numerous occasions to the various will-say statements during his testimony. At no time did he say that the statements were out of order.

Constable McGowan notified no one associated with the case of his 'revelation' on the side of the road. He did not return to the court house to clarify the situation for Crown counsel, nor did he explain the discrepancy and the reason for the confusion to any of the officers.

Ida Morin's Complaint

Ms. Morin made a formal complaint in accordance with the *Police Services Act,*[26] alleging that Constable McGowan had fabricated his testimony and lied under oath. She was adamant in her complaint that she did not speak with him on the evening of October 3, 1984. In accordance with the governing procedure, Constable McGowan was served with the complaint, asked for his explanation, and in due course he responded to the Police Complaints Commissioner.

On June 7, 1992, the Police Complaints Commissioner sent a letter to Ms. Morin. It is obvious that an analysis of McGowan's statements and testimony had ensued. The letter discussed the various will-says and the differences in them. The following passage should be noted:

> In re-examination at your son's second trial, Constable McGowan testified that he had been told his first statement could not be found, and in preparing his second statement, he had not been given any instructions as to what information should go in the statement; he prepared it from what he recalled, from his notes, and from what he could remember putting in his first statement. When asked by Crown counsel how clear his recollection was as to your son looking ahead while he spoke with you, Constable McGowan testified

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[25] A discussion on the conduct of defence counsel is contained later in this Report.

[26] *Police Services Act,* R.S.O. 1990, c. P.15, *as amended.*

> "it's about as clear as the day I saw the picture on TV and it just flashed in my mind what had happened."

Crown Counsel's Use of Constable McGowan's Evidence

Constable McGowan maintained during the Inquiry that he was completely unaware of what use the prosecution would make of his testimony. Mr. McGuigan testified that McGowan's evidence was called because he was the first officer to attend at the Morin residence and to establish that Guy Paul Morin was inside the house. (Mr. Morin had previously said that he was outside that evening helping his father work on the construction; the evidence of Douglas Greenwood and Ted Carruthers contradicted that.) In his closing address, Mr. McGuigan said, in part:

> Now there is this heading called unusual conduct or demeanour ... the observations of P.C. McGowan because during this attendance at the house between 8:30 and 8:45 on October 3rd he testified he spoke to Mrs. Morin and the accused was sitting about eight feet away staring straight ahead; did not turn towards the conversation even though P.C. McGowan was speaking in a fairly loud voice.

He cited other examples of Mr. Morin's behaviour (and which are discussed elsewhere) and concluded: "Now those are some very unusual and strange type of conduct and demeanour, in my respectful submission, that I'd ask you to look at."

Mr. Gover's opinion at the Inquiry was that he did not put any stock in McGowan's evidence because of its late disclosure. He said that since Constable McGowan had not come forward earlier, or made a note of his observations in his contemporaneous materials, the reliability of his evidence was affected and he found it difficult to accept. Mr. Gover added that he would have not elected to call such evidence had he been in charge of the second trial. In the context of contributing to the wrongful conviction, Mr. Gover thought that the evidence of McGowan likely strengthened the prospect of conviction.

Constable McGowan's Evidence at the Inquiry

Several other features of Constable McGowan's evidence at this

Inquiry need be noted. During his testimony, Constable McGowan put forward, for the first time, his opinion that Guy Paul Morin's behaviour that evening may have been innocuous: "[whether he] was unconcerned or didn't realize I was there, I don't know." At no time did he express such an opinion at trial. Several witnesses at this Inquiry sought to minimize the inculpatory aspects of their trial testimony. Some also suggested that they were unaware of the inculpatory use to which their evidence would be put. McGowan did both.

Constable McGowan testified in trial proceedings that he had prepared a will-say statement for the investigating officers for Mr. Morin's first trial in 1985. As explained above, during the Inquiry, he resiled from the position that this was the first will-say. In this statement there is, the following reference to his visit to the Morin house. This is what he wrote, in part:

> I checked with the *occupants* of the house on the northside of the Jessop home. The people inside said *they* had heard the bus stop out front, (Leslie Street) to drop Christine off. *Their* dog barked as it normally did when Christine arrived home after school and that was it. *They* didn't hear or see anything unusual. (*Names* not recorded). (Emphasis added.)

During his cross-examination at both trial and this Inquiry, Constable McGowan had no explanation for the use of the plural form which indicated that there was more than one occupant supplying him with information. He said he did not see Mr. Morin Senior anywhere on the premises. His evidence was that he only spoke to Ida Morin at the door.

Similarly, in his evidence before the Inquiry, at one point, he said this:

> A. I was on the porch and I could only see in not much beyond the door because I could see the end of the couch. I was — I asked a few questions and —
>
> Q. You were asked a few questions?
>
> A. No, I asked a few questions.
>
> Q. What questions did you ask?
>
> A. I asked if *they'd* seen Christine get off the bus after

> school and I believe the response was something to the effect that *they* heard the dog barking, as it normally does, when she gets home after school. But *they* saw nothing unusual, heard nothing unusual and nothing to offer. And that's when I returned back to the Jessop house. (Emphasis added.)

The use of the word 'they' once again indicates that there was more than one occupant supplying him with information. Yet, McGowan was adamant that he spoke only with Ms. Morin. While Guy Paul Morin stared straight ahead.

Constable McGowan was again cross-examined on the late disclosure of his evidence. He advised, for the first time, that he spoke to his supervisor about his attendance at the Morin household during the evening of October 3, 1984. Despite the vigorous cross-examinations that Officer McGowan had faced in the pre-trial motion and during Mr. Morin's second trial, he had never before mentioned such a disclosure:

> Q. You didn't think, sir, that perhaps given Mr. Pinkofsky's suggestion to you that you had invented this story about going over to the Morins' and seeing Guy Paul there, the suggestion that you'd invented the story in 1989, you didn't think of responding by saying: Well, I didn't invent it in 1989 because I spoke with my supervisor about it in 1985. But you didn't think to say that?
>
> A. No, I didn't.

Findings

Constable McGowan is yet another Crown witness whose evidence emerged for the first time at the second trial. One of his will-says indicates:

> It was a mild, damp, dark evening, when I knocked on the door. I was standing on the open porch, when Mrs. MORIN answered the door. I was not made welcome and had a feeling that my presence was bothersome. I made inquiries as to whether she had seen or heard Christine at home, after school. I was advised that their dog(s) bark when she arrives home. They had done so that afternoon. I recall that during the conversation, I had observed THE ACCUSED seated on a couch in the

> livingroom area, looking straight ahead, seemingly unconcerned. I was not made welcome, nor offered any assistance. I felt this strange, for an immediate neighbour.

He ends this section of his will-say with the *caveat*: "THIS INFORMATION IS NOT NOTED — BUT RECALLED"

This will-say was intended to reflect adversely upon Guy Paul Morin and his family. Its contents only came forward at, or after, one of the collective meetings earlier discussed. Characterizations such as "I was not made welcome", "I had a *feeling* that my presence was bothersome", Morin was "seemingly unconcerned" and "I felt [Morin's demeanour] *strange* for an immediate neighbour" is the very kind of evidence that is easy to allege, difficult to disprove; easily tainted by the impressions of fellow officers in a collective meeting and easily coloured by the charge against an accused.

And that even assumes that Constable McGowan attended the Morin residence that night.

While it would have been reasonable for McGowan to have attended at the Morin residence on October 3, 1984, considering they were the closest neighbours to the Jessops, I am left with serious doubt as to whether he even did so. Even more problematic is his evidence as to what he saw at the Morin residence and when it was that his impressions of Guy Paul Morin and his family were first recorded.

His notebook says nothing about his attendance at the Morin residence. No supplementary report reflects any such attendance. There were additional difficulties which he had in describing his attendance at the Morin residence. In any event, neither notes nor supplementary reports suggest anything untoward at the Morin residence.

At the second trial, Mr. Pinkofsky cross-examines McGowan vigorously on his 'late-breaking' allegation. McGowan concedes that his claims about Morin are not reflected in his early will-say. Then, he swears at this Inquiry that he did, indeed, reflect these claims in his earliest will-say; everyone just got the order of his three will-says confused at the second trial. This revelation came to him by the side of Highway 401 after he had been cross-examined by Pinkofsky and released by the Court. Perhaps McGowan did stop at the side of Highway 401 to ponder what had happened to him at

the trial. But his reconstruction of the order of his will-says is seriously flawed. On his evidence, some unknown person left out the part of his will-say dealing directly with Guy Paul Morin in preparing a second will-say for use at the first trial of Guy Paul Morin. That unknown person did include in this second will-say additional matters which were accurate reflections of what McGowan's recollection would be. Then, he was told that his will-say was misplaced. He said he used the second will-say (which was not his) to prepare his third will-say; that explains the deficiencies in the third will-say. Equally significant, having reconstructed the events by the side of Highway 401, he did not return to Court to advise the prosecutors or investigators that his evidence was inadvertently misleading and inaccurate, and he did not advise any superior officers.

The fact that Constable McGowan did not take this opportunity to rectify his trial testimony ties in with his subsequent actions, or inactions, in relation to a complaint made by Ms. Morin following Constable McGowan's testimony at the second trial.

It is clear from Constable McGowan's response to Ms. Morin's complaint that he did not advise the Police Complaints Commissioner of the revelation he had on Highway 401 which, if accepted, might nullify any allegation that his evidence relating to the Morins was fabricated sometime close to the second trial. Again, in the context of this complaint, McGowan did not advise his superior officers that there had been a complete misunderstanding regarding the sequence of these statements. This further undermines his credibility.

I cannot safely rely upon anything that Officer McGowan told me on the critical issues. Apart from his credibility, it is my view that the prosecution should not have been permitted to use this testimony as evidence of conduct or demeanour consistent with guilt. McGowan's evidence now, which minimizes the significance of his observations of Morin, comes too late. He was aware during the second trial that his evidence was being used to reflect adversely upon Guy Paul Morin.

My later recommendations address the use of this kind of evidence.

(iii) Paddy Hester

Ms. Hester's Claim

On April 23, 1985, the day after the arrest of Guy Paul Morin, Queensville resident Mary Elizabeth Hester, known to everyone as "Paddy," spoke with Detective Christopher Barratt of the Durham Regional Police Service who recorded her six page signed statement. In describing her involvement and participation in the search for Christine Jessop on the night of October 3, 1984, Ms. Hester told Detective Barratt about an encounter with a 30 to 33 year-old male person wearing a fawn-coloured trench coat, lace-up work boots, and blue jeans. His hair was light and bushy. According to Ms. Hester, this man told her that he lived beside the Jessops and that he had a daughter who was a playmate of Christine. She told the detective that this man's heart was not in the search effort. The detective's supplementary report of that date noted that Ms. Hester advised in response to his inquiry that she did not know that an arrest had been made in the Jessop case. Detective Barratt made the following comment in his report:

> It's not my opinion that she is trying to cloud the arrest however in view of the ... matter it should be recognized as a possibility. ... I think her story should be confirmed or denied to save possible headaches later on.

On February 6, 1987, almost two years later, Ms. Hester provided the police with a second handwritten statement relating to her participation in the search for Christine, documenting a markedly different version of her involvement in the search. In her later evidence at Mr. Morin's second trial, she related the following. On October 3, 1984 she received a telephone call from a friend asking if she and her husband could assist in the search for the missing child. They arrived at the Jessops at 10:15 p.m. Those who attended were divided into two search parties. She and her husband joined separate search parties. Ms. Hester testified about her active involvement in organizing the search:

> They were standing doing nothing so I put them into squads & sent them off to search the cemetery & ravine, while I took 10 men to search the farm buildings across Leslie St. from Jessop home.

She said she returned to the Jessop home at 11:45 p.m. and then went to the fire hall. She walked back from the fire hall to the Jessops' to find her husband. She claimed that on her way back she saw a red pick-up truck stopped on the east shoulder of Leslie Street directly in front of her. It was on the wrong side of the street for the direction it was travelling. The engine was running, but it was not moving. Its lights were out. As she got within approximately 100 feet from the truck, the headlights came on. She claimed that, being by herself, she was nervous and started to veer to cross the street to the other side, when the car drove over and partially blocked her path. Alphonse Morin, was the driver:

> He was wearing work clothes and he had a feed mill type cap on, as you refer to it, a baseball cap, and looked as if he hadn't shaved that day. He had a growth of whiskers on his face.

According to Ms. Hester, he wore construction boots, but since she did not get up on the running board it is unclear how she could see his boots. When Mr. Pinkofsky questioned her about this, she replied: "It was the way he had the foot placed, Mr. Pinkofsky. I could see, glance down." Alphonse Morin asked her where she had searched and whether anything had been found; she told him to go to the fire hall and ask the police.

At the second trial, Ms. Hester described Guy Paul Morin sitting in the truck between his father and his brother-in-law, Frank Devine, wearing a beige trench coat: "[h]e was just sitting there with his hands clasped on his lap looking out the window straight ahead, staring, sort of." Alphonse Morin, Frank Devine and Guy Paul Morin were adamant that these events did not occur; they were not out together that evening.

Ms. Hester purported, in her evidence at the second trial, to have made another observation — this one on October 6th. She testified that on that day, she went to the Morin property by herself, gaining entry by climbing over the fence. She claimed that she approached a car (which she eventually identified as the Honda) parked near the rear of the residence. She looked inside through the windows and saw what she described as "a pigsty." It was, she testified, "full of litter, old coffee cups, and old pieces of paper, napkins, that sort of thing and coffee stains, and it was dirty." She then described a pink cloth or a blanket in the back seat of the vehicle. She said that she was about to open the door to see what was under the blanket when the back door of the house flew open and Guy Paul Morin came out:

> screaming and yelling at me to get out of his yard and get away. He didn't want me to look in his car. And I thought, oh, I thought he thought I was breaking in. So I said: "Oh, I'm one of the searchers." That made him even worse. He started screaming and yelling at me and coming at me with fists.
>
> Q. All right. And what did you do?
>
> A. Bailed out over the fence as best I could.
>
> Q. All right. And as a result of going over the fence, did anything — did you in anyway injure yourself or hurt yourself?
>
> A. Yes, I did.
>
> Q. What happened?
>
> A. I ripped my jeans and I cut my leg.

She continued searching despite her injury for a further 45 minutes, but did not seek medical help. The incidents described in her evidence were substantially those related in her handwritten statement.

In both her handwritten statement and in her evidence at the second trial, Ms. Hester said that she had reported both of these encounters to the command post. She testified that she reported the October 6, 1984 incident first to a cadet and, upon his instruction, then to an officer at the command post when she finished searching that day. She testified that she also told the police about the October 4, 1984 encounter but could not recall when she did so. There is no record of any such reports. Of course, Detective Barratt's April 23, 1985 report has Ms. Hester describing a very different encounter.

During the summer of 1989, Detective Fitzpatrick and Inspector Shephard unsuccessfully attempted to locate the command post log book in order to verify Ms. Hester's alleged reports. Nor could the reports be confirmed by the recollections of any police officer or searcher, despite police efforts in this regard, also during the summer of 1989.

At one time, Ms. Hester had been a secretary in the law firm of Pinkofsky, Lockyer & Kwinter. After Mr. Morin's first trial, she was employed by lawyers who shared space with Clayton Ruby. During this time,

Ms. Hester performed some clerical work for Ms. Mary Bartley, an agent for Mr. Ruby, in connection with the Crown appeal of Mr. Morin's acquittal

On January 25, 1989 Detective Fitzpatrick interviewed Claire Hester, Paddy Hester's daughter. According to Detective Fitzpatrick's notebook entry, Ms. Hester recalled her mother:

> saying something strange about persons at a house wanting to know what she [was] doing on [the] property. [Her] mother did not appear upset. Went to Huron Heights School at time. Grade 9 or 10. Likely mother told her of incident right away.

Detective Fitzpatrick's supplementary report of the interview reflects that Claire Hester indicated that her mother said something about "a person" asking her what she was doing on the property. Her mother said she thought that was strange because everyone knew about the missing girl.

In a supplementary report dated August 17, 1989, Sergeant Chapman recorded that in an interview with Kim Hester, Ms. Hester's husband, he said that his wife was the type of person who might "guild the lily;" and exaggerate to make herself look more important. However, he was sure she would not do so to the detriment of another, or perjure herself in order to convict Mr. Morin. Mr. Hester said that his wife had told him about the October 6th incident with the Morin Honda the night Christine Jessop disappeared. The transcript of a tape-recorded interview of Mr. Hester on August 31, 1989 by Inspector Shephard and Detective Fitzpatrick records the following questions and answers:

> Q. Are you certain that Paddy told you about the incident with Morin and his car on the Wed-Thurs Oct 3rd or 4th
>
> A. Well it's been a long time. I can't say for certain. I know it was the same day it occurred she told me.
>
> Q. couldn't it have been [Saturday, October 6th]?
>
> A. Yes I'm sure it was the same day she told a police officer right after it happened. During the trial Paddy was [agitated] because this info didn't come out. She felt it was either the police or crown decision not to bring it out or to introduce it.

On August 24, 1989, Constable Patrick Hester, Paddy Hester's son, a member of the York Regional police force, was interviewed by Sergeant Chapman. The supplementary report of that interview reflects that Constable Hester was asked if he though his mother might make something up about her involvement in the case. Constable Hester stated that he could not see any reason for her to do so as she did not know either the Jessops or the Morins.

On March 29, 1990, Ms. Hester took a polygraph test at the request of Detective Fitzpatrick. Mr. Scott arranged for the test to be conducted by the Peel Regional Police Force.

The supplementary report of Detective Michael Stephenson of the Peel police force, dated March 29, 1990 reflects that:

> [t]he issue under consideration was whether [Ms. Hester] was telling the truth when she claimed that while engaged in a community search for missing Christine JESSOP, she was confronted by Guy Paul MORIN in his backyard.
>
> The questions asked of a relevant nature were: 1. DID YOU LIE to me today when you said MORIN ordered you away from his car in 84? 2. DID YOU LIE to the Police when you said MORIN ordered you off his backyard in 1984? 3. ARE YOU MAKING UP THE STORY about MORIN confronting you in his backyard?

Detective Stephenson's opinion, on the basis of the polygraph test, was that Ms. Hester was truthful in answering these questions.

February 6, 1987 Interview

On February 6, 1987, Detective Fitzpatrick interviewed Paddy Hester. (At this interview Ms. Hester provided him with her handwritten statement). At this time, the Court of Appeal for Ontario was hearing oral submissions on the Crown appeal against Mr. Morin's acquittal. In her statement, Ms. Hester indicated that ten days prior to writing the statement, Ms. Bartley had asked her to type a draft of the evidence heard at the first trial. According to her statement, Ms. Hester typed the first few pages and then passed the matter to Mr. Ruby's secretary. In her statement, she said "I was so haunted when what I knew from the search clicked with the excerpt from the transcript I

read". Ms. Hester advised that she talked to Detective James Allen, a York Regional police officer, who advised her to contact Inspector Brown immediately. As a result of doing so, Detective Fitzpatrick attended her home for an interview.

During the Inquiry it was discovered that the February 6, 1987 interview of Ms. Hester by Detective Fitzpatrick was tape-recorded. This fact was not disclosed to the defence at the second trial. The evidence was that prior to the Commission proceedings, the Crown attorneys were unaware of the taped interview. It was only after the completion of Detective Fitzpatrick's evidence before this Inquiry, that the interview tape was found amongst material turned over to the Jessop Task Force by the Durham Regional Police.

Inspector Shephard found this non-disclosure surprising. Following an interview with Ms. Hester, his January 5, 1989 notebook recorded the following entry: "Interview, Paddy Hester ... Interview tape recorded. Fitzpatrick had interview previous."[27] Inspector Shephard said that he could not recall listening to the tape of the 1987 interview between Fitzpatrick and Hester played at the Inquiry.

Several portions of the transcript of this recording are reproduced below: they serve to illuminate the interview process that had been engaged in with this witness and I will have more to say about this later.[28]

> Fitzpatrick: I've also heard okay, somewhere along the line, that Ruby had said that if Devine, if he put Devine on the stand, Devine would send [Guy Paul Morin]
>
> Hester: to the slammer

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[27] However, when the defence requested disclosure of a tape or transcript in relation to the January 1989 interview with Ms. Hester, they were told that it had not been tape-recorded.

[28] Two different transcripts of this interview were filed as exhibits during the Inquiry. The taped interview had much background noise and some distortion; accordingly, certain portions of the tape were inaudible. The different versions are essentially the same, with some variation in what could be heard during the distorted section. For the purposes of this Report, the tape transcribed by a member of the research staff of the Commission is used. This was also the version which was used by most counsel at the Inquiry.

Fitzpatrick: Yes.

Hester: All right this is my, what do you call, Irish sense and the old experience coming [inaudible]. I'll tell you something. The father and Devine are covering up for him.

Fitzpatrick: Well we've always figured the father knew.[29]

Hester: The father knows and Devine knows but they're covering up. That's my own theory on the thing.

Fitzpatrick: Well both John and I, John Shephard, that was my partner at that time, both John and I always figured right from the word go that the old man knew.

Hester: Oh, the old man knows for sure.

Fitzpatrick: And I think the old lady knows.

Hester: Yeah, but you see what happens the father so [inaudible] the mother is terrified, [inaudible] I feel sorry for the woman.

After listening to this tape during the Inquiry, Inspector Shephard acknowledged that, by relating such information to a prospective witness, evidence could be tainted, leading a witness to "add something more to her statement down the line, whereas she normally wouldn't."

Detective Fitzpatrick also discussed with Ms. Hester other evidence in the case. In particular, he advised her that pink angora fibres had been found:

Fitzpatrick: Can you recall anything pink in the car that night?

Hester: I didn't get close up to look in the car that

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[29] In his evidence, Shephard related his reason for believing that Alphonse Morin, but not Ida Morin, knew his son was guilty — on two occasions he and his partner attended at the Morin residence. Ms. Morin was present and spoke to the investigators. Through Ms. Morin, a request was made for Mr. Morin Sr. to call the police to arrange a time to meet, but he failed to do so.

night. Is that the Wednesday night you're talking about?

.....

Fitzpatrick: Okay, getting back to this pink

Hester: Yeah, like, you know if someone took a cloth and flung it over something, say you wanted to cover something up in the back of the car. Whatever it was on the floor in front of the back seat [inaudible] Whatever it was it was flung over that, and part of it came up on the back seat but whatever it was covering was higher than the level of the back seat, you know it was about that much higher. And that's what I wanted to see and that's when the bugger came out and went for me.

Fitzpatrick: That's when he started going a bit berserk on you.

Hester: Yeah. Came at me with his fists. He was really berserk. [inaudible] I still have the jeans with the hole in them where caught in piece of wire.

Fitzpatrick: Yeah

Hester: And the damn thing went right into my leg too because it was bleeding like a pig.

Fitzpatrick: Could you, would it have been ah, do you know what angora is?

Hester: Yes.

Fitzpatrick: Could it have been something like that?

Hester: It was ah it wasn't angora but I'll tell you what it was, it was, okay, you know when you see this fabric here has got [inaudible] hairs.

Fitzpatrick: Yeah.

Hester: Fibres

Fitzpatrick: Yeah.

Hester: Well it was the same sort of material, not tweed like this but it had

Fitzpatrick: It would have had, would have been... long hair sticking out of it, like would it have been easy to

Hester: [inaudible]

Fitzpatrick: Yeah.

Hester: It might be, if you were wearing maybe slacks or something like that it would probably who on them I would imagine.

Fitzpatrick: Okay, did you follow the trial at all?

Hester: No, I didn't. I was too sick.

Fitzpatrick: Okay, do you have any idea what it was, if, if we get a new trial [inaudible]

Hester: You know what it reminded me of? What do they call them here, the things they throw over sofas and chairs.

Fitzpatrick: Just a throw?

Hester: A throw. At first that's what I thought it was and then I thought no maybe it's a bedspread or something. And I looked again and I thought no, it's not big enough for a bedspread, and maybe it's just a piece of material, you know, a remnant or something.

Fitzpatrick: Yeah.

Hester: But it wasn't angora but it was

Fitzpatrick: Would it have been a rabbit type thing?

Hester: I don't know. Not [inaudible] I know what angora is, no, it wasn't definitely, it wasn't angora, it was

Fitzpatrick: But definitely a pink

Hester: Oh it was pink because I thought to myself Oh God.

Fitzpatrick: Yeah.

Hester: [inaudible] like a bloody pig stye. And it was dirty, the pink cloth was dirty.

Fitzpatrick: Ever been in the house?

Hester: Yeah I can believe it.

Fitzpatrick: Okay, now that pink, see we found pink material of an angora type, that's the reason I'm asking for angora. We found it on her, on her body and found it in his car. Of course, but, you know, there's six months of her laying out there, you know, everything with [inaudible] we didn't get too much and of course then our good friend Mr. Ruby says that Queensville is full of hairs and fibres blowing all over the place.

Hester: He's so full of shit. Pardon me. [laugh]

Fitzpatrick: But that was one of the things he did pull, like, you know, in fact he left the jury to believe that if you go to Queensville at all you'd never run into a snow storm, you'd run into a hair and fibre storm. You know, so.

Hester: [inaudible] rot in hell...

Detective Fitzpatrick advised Ms. Hester during this interview of the importance of the pink fabric:

> Fitzpatrick: With yourself, Patty (sic), if we had known, we would have been able to put that pink thing in. See we couldn't find, when we searched the house, if I recall correctly, mind you I wasn't at the search cause John and I had *him*. I don't think we found anything pink at all that could match the fibres that we had but you know we are really hoping that we're going to be able to get another kick at him.

During the course of the interview, Detective Fitzpatrick communicated to Ms. Hester further information suggesting that Mr. Morin committed the murder:

> Fitzpatrick: I've been in fairly close contact with somebody that is fairly close to Morin and this person

feels that if they could probably get him away from the parents she'd get a confession out of him. Also word did come to us that Ruby wanted to plead guilty and Guy Paul was, plead not guilty by reason of insanity and Guy Paul was going to do the same thing.

Hester: He was willing to go with that because Mary Bartley went to the jail to talk to him about that and he agreed to it and then the father came into the office storming and raging, he embarrassed everybody in the office because he started screaming [inaudible] through the front door.

Fitzpatrick: Is that right eh?

Hester: Yeah, Oh god, it was [inaudible]

Fitzpatrick: They're awful people aren't they?

Hester: Oh, they're terrible. He's another reject too. He, I swear, honest to God I swear on the lives of my children and my husband that that old bastard and Devine were covering up. They know. And I'll tell you something they know where different things are too because I think they were the ones that hid them, got rid of them.

Fitzpatrick: Is that right eh?

.....

Fitzpatrick: Well, Shephard and I right from the time we really started to look at Guy Paul as being the perpetrator, and we felt that the father had always known.

Hester: Yes, that's it, you see he rules the household with an iron fist. No one else has a say in anything. You're not even allowed their own thoughts. The father dictates them.

Ms. Hester commented on her knowledge of the legal team defending Mr. Morin:

Hester: I think [inaudible] just because I heard a young lawyer and a couple of students talking [inaudible] and they were saying it was reserved, the

decision on it. But Ruby was really depressed. He'd gone out with another lawyer, buddy of his, they'd gone to have a few drinks, to do some talking and Ruby figured it might go against him and [inaudible] another trial.

Fitzpatrick: They're gearing up for it

Hester: [inaudible] I'll tell you something [inaudible] I have a funny feeling if there is another trial, Ruby knows that I know things, he's not sure just what I know but he knows I know things. He probably I think would try, through Bartley or someone else, to tap me and either hamper me from being used or try and see [inaudible]

Fitzpatrick: [laughs] ... Irish in you. You know what they say about us Irish. Well that's like, I'll tell you without a word of a lie, when we've lost, like you know, there's no doubt [inaudible] a person is insane, of course, Guy Paul is insane because psychiatrists [inaudible] three, two psychiatrists and a psychologist say that. I'm not much in love with psychiatrists or psychologists okay, because to me they're always doctors who couldn't be doctors so they go into the mind.

Hester: That's right. Because nobody knows and can't prove them wrong.

Fitzpatrick: That's right. But, you know, I suppose they do have to learn something, I suppose, a lot more than you and I figure but.

Hester: You can learn to read people

Fitzpatrick: That's right.

Hester: You can learn to read them.

Fitzpatrick: And, you know, Orchard, Basil Orchard said at trial that yes he was 1% of the world's population or something, and a very minuscule part of that 1% population fitted into a category that would commit such a crime and Guy Paul fell within that category. And of course when we get this, we see a copy of this affidavit that he's signing or that he says, you know, he's changing, this is what I said at trial but

this is what I meant, nobody asked me this sort of thing, I'm sure it was, well, and Orchard has gone along with it. And it wasn't' Ruby's or it wasn't Orchard's stuff at all.

Hester: Orchard didn't know what the hell it contained until he got it put in front of him to sign on the dotted line.

Fitzpatrick: Is that right 'eh?

Hester: Honest to God, I swear.

Ms. Hester commented disparagingly on Mr. Ruby and Dr. Orchard and how Dr. Orchard came to give his evidence. The following exchanges are directed towards Mr. Ruby:

Hester: [inaudible] He surrounds himself with [inaudible] ... literally die for him because he's got them all fucking brainwashed ... Basically Satan worship him [inaudible]

Fitzpatrick: It was obvious at the appeal.

When asked about these comments during the Inquiry, Inspector Shephard said it raised his concerns about bias.

The two discussed the prospect of another murder by Mr. Morin. This was something that had previously been discussed with Frank Devine and, according to Inspector Shephard, perhaps also with the Jessops:

Fitzpatrick: Paddy if, and I hope to God we do get another trial because if [inaudible] definitely no justice if this kid walks because he'll do it again.

Hester: I know. [inaudible] Why do you think I have that black dog and I've got two more coming tomorrow.

Fitzpatrick: Yeah. There's no ifs ands or buts about it. He will do it again like because he beat the system. Like he said the system works – if you recall what he said exactly.

Hester: That's right. I listened to it last night.

[inaudible] shouldn't have said that. [inaudible] He's more inclined to do it more again because he is now [inaudible] egotistical [inaudible] And he's going to do it again just to prove the he can do it and get away with it. And he'll keep doing it. And I'll tell you what's more. [inaudible] He's not going to do it [inaudible] He's going to come back to the same turf and do it again.

Fitzpatrick: Yeah. We even, we, separately we kicked that around. The only other alternative is that he might grab a little girl from Durham Region and dump her in York, just to play games. Play games.

Hester: Yes. ...He could do that. Yes.

Fitzpatrick: If not, he will grab a little girl from Queensville again or York or closer to Queensville and dump her in our area again.

Hester: [inaudible]

Fitzpatrick: Yeah. But he'll dump them over in our territory again.

Hester: That's right.

Fitzpatrick: Okay, and then just sort of sit back and laugh at us.

Hester: Yes. Yes. Because that's exactly what he's doing.

Fitzpatrick: But of course and I think again getting back what you're saying the old man definitely knows because the old man now is controlling him like they just won't let them out of his sight.

Hester: That's right.

Fitzpatrick: He just won't let him out of his sight.

Hester: That's right. That's exactly it.

Fitzpatrick: Anyway, I was going to ask, Paddy, if we get a new trial, you know I'll have to talk to John Scott about you seeing me.

Hester: I don't care.

Fitzpatrick: Okay, and you know you'll be subpoenaed.

Hester: I don't care.

Fitzpatrick: Okay. Good.

Hester: I mean, that's where I was the other day in one of the cases for the York Region boys. I did two positive IDS for them and they're going to crucify the bastards.

Q: [laugh] well you [inaudible] able to do that unfortunately the system does not [inaudible] do it for us.

A: [inaudible] good ID evidence.

Q: Yeah.

Detective Fitzpatrick inquired about Ms. Hester's background. She claimed to have been in British 'Naval Intelligence' in the 1950s:

Fitzpatrick: How long were you in British Intelligence?

Hester: [inaudible] two and a half [inaudible] years. [inaudible] The British Intelligence is different because the more [inaudible]. The British Intelligence is good. But it's more.

.....

Hester: [inaudible] Anyhow [inaudible] experience and everything [inaudible] naval service [inaudible] started off in the staff of the Commander in Chief and I was promoted to [inaudible] assistant to Sir Nigel Henderson. And then I got drafted to Malta where I worked on the staff at Sir John A. Henderson, or not Henderson, [inaudible] answer to the [inaudible] intelligence guys [inaudible].

Inspector Shephard told the Inquiry that he did not recall attempts to verify Ms. Hester's description of her role with the British intelligence

service, but did recall that this was being done by someone, perhaps the defence. He was unaware that the defence was advised by the British Ministry of Defence by letters dated December 2, 1991 and January 9, 1992 that Ms. Hester had never worked for Naval Intelligence and that she had actually worked as a 'Wren writer,' or secretary. When cross-examined at trial on this point, Ms. Hester responded that for security reasons she could not provide details, nor would the Navy release that information. In light of Ms. Hester's response, the Crown would not agree to the filing of the letters unless the author could be cross-examined. The Crown's further position was that this was a collateral matter upon which the defence was not entitle to adduce evidence.

During the interview, Detective Fitzpatrick asked Ms. Hester whether she had previously reported her version of the events:

> Fitzpatrick: Do you know. Just, my mind's racing a thousand things here. Do you know. You mentioned to [inaudible] when you saw this pink stuff into the car you mentioned it to York Regional detectives.
>
> Hester: Yes I did. And he wrote it in a log. [inaudible]....
>
> Fitzpatrick: yeah, okay. I never did see their logbook.
>
> Hester: Can you put your hands on it?
>
> Fitzpatrick: Yeah. All I got to do is call Bob Wilson about it.
>
> Hester: Yeah. Call Bob. I know Bob. Call Bob and ask him, if you look on your Saturday, last day of the search was the Saturday [inaudible] it should be in there because I went out, I was one of the [inaudible] search parties going at once and I was at the one that did the stretch and that was the first one in the morning you know on that area.

As indicated above, although the investigators were able to confirm that Ms. Hester participated in the search, they were unable to verify her claim that she had previously reported these incidents.

Detective Fitzpatrick also questioned Ms. Hester about 'remnants of blood'. He questioned her in a manner which Inspector Shephard told the

Inquiry might taint her evidence. This is what was said:

> Fitzpatrick: Can you recall, you said you have an excellent memory, can you recall ever seeing the driver's side of the vehicle, can you recall ever seeing any brown spots or blood or anything that looked like blood on the vehicle?
>
> Hester: Driver's seat. A lot of dirt marks, what I thought were dirt marks.
>
> Fitzpatrick: Okay. Did you notice them on the handle, of course the car was filthy.
>
> Hester: The car really was filthy.
>
> Fitzpatrick: Can you recall ever seeing them on there at all or? [Pause] There was remnants of blood found on the driver's wheel and on the door handle of the car. That of course, being so old, that was six months from the time she went missing, of course, and the CFS didn't even group it to say [inaudible] human blood or animal blood or anything.
>
> Hester: Like I just took it to be like [inaudible] There's one thing I did notice. I thought it was like coffee [inaudible] driving along and you hit the brakes and you have a cup of coffee [inaudible] and it flew out.
>
> Fitzpatrick: Yeah.
>
> Hester: [inaudible] I saw that.
>
> Fitzpatrick: On the car?
>
> Hester: [inaudible] I thought it was that. I don't know if it was coffee but I [inaudible] you know those paper cups you get when you go to Mr. Donut or something.

At a later point in the interview, Detective Fitzpatrick exclaimed "Jesus, it's too bad you didn't get, we weren't able to get [inaudible] you before."

Inspector Shephard acknowledged that Fitzpatrick did not conduct

this interview in a professional manner so as to elicit a reliable and accurate account from Ms. Hester. He further agreed that Ms. Hester's comments about Mr. Morin's lawyer at the first trial raise a concern about bias.

Shephard testified that the following statement might give him particular cause for reflection on Ms. Hester's reliability:

> Hester: I've thought about, since that Saturday morning, [inaudible] picked up the next door neighbour and charged him with murder, I almost did cartwheels and flips and my old heart was going ... I thought [inaudible] was right.

At the time of their evidence before the Commission, neither Mr. McGuigan nor Ms. MacLean had read the transcript of Detective Fitzpatrick's interview of Ms. Hester. Both had been advised generally of its contents. Mr. McGuigan expressed surprise that he had not been provided with a transcript of the interview at the time of the second trial. Lengthy excerpts were read to Mr. McGuigan and he provided his comments, as set out below. Ms. MacLean said that, had she been aware of the discussion, it would have altered her assessment of Ms. Hester's reliability and credibility. For example, she and her co-counsel had wondered whether the pink throw Ms. Hester described in the Honda might be the source garment of the fibre evidence. Detective Fitzpatrick's comments about pink fibres would have greatly concerned Ms. MacLean, apart from the tenor of the entire conversation as she understood it.

Mr. McGuigan found the suggestions and information provided by Detective Fitzpatrick to be inappropriate. He elaborated as follows:

- Suggestions to a prospective witness that Mr. Morin was guilty may colour the witness' evidence;

- The reference to looking for pink angora was troubling in that the witness may attempt to fill in the void;

- Ms. Hester's dislike of Ruby was obvious, giving an indication of bias. Mr. McGuigan was not sure how that would filter into the case given Mr. Ruby was not involved at the time of the interview;

- Mr. McGuigan was not concerned by police questioning as to work done on the case for Mr. Ruby's office, subject to the issue of privilege. His sense was that neither Ms. Hester nor Detective Fitzpatrick understood the principles of privilege;

- Ms. Hester's statement that she was almost doing cartwheels and flips when she heard Mr. Morin had been arrested for murder gave cause for concern about her reliability.

Mr. McGuigan suggested that if Ms. Hester's handwritten statement, which was provided prior to any prompting by Detective Fitzpatrick, was consistent with her evidence, one might conclude the interview had no effect on her evidence. Nonetheless, Mr. McGuigan agreed that the manner in which Ms. Hester refers to Mr. Morin and his family and to Mr. Ruby would give serious cause for concern. He described the interview as "a very serious matter" and upon review, he may very well have decided not to call the evidence.

Mr. McGuigan also expressed his view that the manner in which the interview was conducted may be a product of the person being interviewed. In that regard, he had some sympathy for Detective Fitzpatrick in that "you say one word and away she goes".

Inspector Shephard testified at the Inquiry that he was concerned about Ms. Hester's veracity and the impact her evidence may have on the Crown's case should she be shown to be a liar. He was sceptical of both her story about Mr. Morin and of her claim to have worked for the British Intelligence. During the stay motion, he learned that the latter claim could not be supported by work records. He also knew that she had previously worked at Mr. Pinkofsky's office and claimed to have had an altercation with his partner. He expressed his scepticism to John Scott and "probably" all of the other Crown attorneys involved in the case. He could not recall any Crown counsel expressing reservations about Ms. Hester's veracity.

Detective Fitzpatrick was directed to Ms. Hester's original (1985) statement, the police attempts to verify her later (1987) account, and her husband's comment concerning her credibility (set out above). He was

asked:

> Q. At the end of the day, Mr. Fitzpatrick, where this woman Hester was concerned, there were several reasons, were there not, why one might take her story with a pinch of salt, to put it politely? Do you agree with that?
>
> A. Not really, no.

When asked if he thought her evidence was credible, he responded:

> A. I placed the evidence before the Crowns. I don't place it before a jury in a trial, and how the Crowns handle it, that's their decision.

Fitzpatrick was sure he discussed Ms. Hester with the Crowns.

Mr. Scott said that he arranged to have Ms. Hester undergo the polygraph test, in part, because her evidence had come forward so late, and partly because of her past relationship with the law firms involved in the case. Mr. Scott's concerns with regard to the timing of the evidence were eased by Ms. Hester's assurance that she had contemporaneously reported the incidents. In that regard, his experience obtaining records of the command post had been less than positive in that a number of items that were supposed to have been there were not, and were never found. Mr. Scott also spoke to another Crown attorney who had called Ms. Hester as a witness in another case and whose assessment of Ms. Hester's veracity was "strong." Mr. Scott may have also spoke to Constable Patrick Hester, Ms. Hester's son, at some point. No negative comments as to her credibility were communicated to him.

Mr. McGuigan called Ms. Hester at Mr. Morin's second trial. He understood that prior to his involvement in the case, the issue of her reliability had surfaced with Mr. Scott, primarily, and the investigating officers. Mr. McGuigan's understanding was that the concerns arose out of the timing of the evidence and Ms. Hester's unique personality, which could arouse suspicion. Mr. McGuigan was aware of the results of the polygraph test. He knew that while family members, and one a York Regional officer, had indicated that they had some concerns about her credibility, they did not think she would make up such a story. He also knew that another Crown attorney who had prosecuted a case, in which Ms. Hester was the

complainant, thought she was credible. Both Mr. McGuigan and Mr. Smith told the Commission that neither Inspector Shephard nor Detective Fitzpatrick expressed concern to them about Ms. Hester's reliability. To the contrary, Mr. Smith suggested, the police went to some lengths to demonstrate her credibility.

Mr. McGuigan could not recall whether he asked Ms. Hester why her evidence came forward so late but he remembered that she had expressed surprise that she was not called at the first trial. In reviewing her evidence, nothing caused him to question her credibility. The absence of a contemporaneous record was not determinative. The fact that the reports could not be confirmed by the recollections of any police officer did not surprise Mr. McGuigan given the routine nature of the matter being reported.

Mr. McGuigan's position on this issue as it related to the evidence of Ms. Hester, Constable Robertson, and Messrs. Greenwood and Carruthers, all of whom claimed to have made a contemporaneous report (claims which could not be confirmed) was expressed as follows:

> So you come to two conclusions. Either they didn't make it and they're lying about it, or there's some very poor note taking or record keeping on the part of the York Regional Police.

Mr. McGuigan had not decided whether he accepted Ms. Hester's claim to have been involved with British Intelligence. He had been informed by the police that telephone contact had been made with the authorities in Great Britain who had advised that records as to whether Ms. Hester had worked in Intelligence were privileged. In light of this, the accuracy of the letter received by Mr. Pinkofsky from the British Intelligence indicating that she had been employed as a secretary was suspect. Mr. McGuigan did not know whether the defence was advised of Detective Fitzpatrick's telephone inquiry. (It was not referred to in the letter received by the defence, *supra.*)

Mr. McGuigan also considered that Mr. Pinkofsky recommended Ms. Hester to Mr. Ruby's firm, an indication that she was not a "flake".

In Mr. McGuigan's opinion, Ms. Hester was a good witness. He denied that the Crown attorneys were embarrassed by having called her. Although the jury showed amusement at the way she described things, given her unique turn of phrase, he did not think they were amused by the

testimony itself.

Although he had no specific recollection, Mr. Smith was sure the Crown attorneys discussed Ms. Hester's veracity, particularly her claim to have worked as a spy. Mr. Smith concluded that Paddy Hester "did not fall into a black and white category" of witness in that she was a "shade of grey." In that context, he understood there were potential problems with her veracity.

Ms. Lorraine Pike was a Crown witness at Mr. Morin's second trial and at the Inquiry. Her evidence relevant to the issue of the Jessop's arrival time home on October 3, 1984 is discussed elsewhere in this Report. Ms. Pike's daughter is married to Paddy Hester's son, Constable Patrick Hester. As mentioned above, Constable Hester was a member of the York Regional police force. During her evidence at the Inquiry, Ms. Pike said that despite her relationship with Ms. Hester (as a result of her daughter's marriage), she did not know Ms. Hester very well; their relationship was "distant." Ms. Pike expressed her opinion that although Ms. Hester exaggerated at times to make herself seem important, she would not go so far as to say Ms. Hester told lies. At the time of the second trial she was not asked nor did she convey such an opinion to the police or the Crown attorneys. Neither Mr. McGuigan nor Mr. Smith were aware of the relationship by marriage between Ms. Pike and Ms. Hester.

Findings

Ms. Hester's present ill-health precluded her from testifying before this Commission. I did have the benefit of hearing her on tape, in the context of an interview conducted by Officer Fitzpatrick.

The day after Morin's arrest, Paddy Hester came forward with a story. It described a discussion with Christine Jessop's next-door-neighbour whose "heart was not in the search effort." The officer appreciated that it was possible that she was trying to "cloud the arrest," which I take to mean that she was possibly an intermeddler who had nothing to offer. If I am right, his assessment may have been unerringly right and prescient of what would come.

Hester was not called upon for Guy Paul Morin's first trial. (The prosecutors were unaware of her evidence.) Mr. Morin was acquitted. The

Crown appealed. Prior to the second trial, Ms. Hester was motivated to come forward to assist the prosecution. She alleged that she had witnessed a strange encounter with the Morins in a pickup truck (with Morin staring straight ahead) and a second incident where Morin had chased her away from the Morin Honda before she could search it.

She claimed that her story had been reported to the York Regional Police in a timely way. Indeed, this was a common thread running through the evidence of a number of the 'late-breaking' witnesses to meet the defence suggestion that their evidence was more recently fabricated. This evidence is summarized when in arises in this Report. For example, we have already seen that Robertson claimed that he left the missing blue sweater at the command post.

I have earlier commented upon the failings of the York Regional investigation in Chapter IV. There may be instances where 'late-breaking' evidence could be explained in this way. *However, I do not believe that the command post was some 'black hole' or that York Regional Police were so incompetent that all of the 'late-breaking' evidence at the second trial can be so explained. At some point, the absence of any confirmatory records defies coincidence and raises serious issues as to the reliability of claims made years later and well after Mr. Morin's arrest and first trial.*

Ms. Hester's claim would appear inconsistent with the supplementary report prepared about her in 1985. Family members did suggest that part of her claim was made in a more timely way to them. These same family members raise an issue as to her tendency to exaggerate, though not maliciously so.

Ms. Hester's claim that she played an important role in Naval Intelligence excites the gravest suspicion — particularly, when a letter from the British Government described her, in essence, as a secretary. Her response — that the Navy would not reveal her true role for security reasons — should have excited even graver suspicions. The Crown's response — the letter(s) were hearsay and the issue collateral.

The February, 1987 interview that Officer Fitzpatrick conducted with Ms. Hester was disturbing, both in what it said about her attitude and in what it said about Fitzpatrick's approach. Her animosity towards Guy Paul Morin (and his counsel) was patent. Her admission that "she almost did cartwheels

and flips" when Morin was charged with murder was particularly illuminating.

In the interview, Officer Fitzpatrick shared with Ms. Hester the evidence which existed against Guy Paul Morin. In particular, he told her what forensic evidence was found in the Morin Honda (including 'remnants of blood') as an introduction to questions as to what she saw in the car. He shared with her his and Shephard's views as to Guy Paul Morin's guilt. He expressed how much he wished they had known about her evidence before. This was a text-book example of how *not* to conduct an interview.

In fairness to Officer Fitzpatrick, I do appreciate that Paddy Hester's personality, irrepressible manner, shared views in Morin's guilt and gossipy treatment of the defence, may have caused Fitzpatrick to be more suggestive and careless than he otherwise would be. However, we do not know what many of the interviews with Crown witnesses sounded like; these generally were unrecorded. A few glimpses at conversations that were recorded indicate that other witnesses were also told in no uncertain terms that Morin was guilty, family incest was raised (though these false allegations did not originate with the officers) and witnesses were questioned in a suggestive fashion. This interview may represent an extreme example of what was happening with a number of witnesses, but it remains an example, nonetheless.

Disclosure of this taped interview to the defence would have, in my view, seriously, if not fatally, undermined Ms. Hester's credibility. However, I find that it was not disclosed to the defence, or for that matter, to the prosecution. This is disturbing. Shephard's notes did reflect that Hester had been interviewed at an earlier date than in 1989, when she was interviewed again. The notes make it appear that the 1989 interview was tape-recorded. When defence counsel sought the tape-recording, they were told that the 1989 interview was, in fact, not recorded. No one told the defence that the 1987 interview had been recorded instead. I cannot find that the tape-recording was deliberately suppressed by Fitzpatrick. I do not know one way or the other. But I will say that this tape-recorded interview was cogent evidence in support of the taping of police interviews with important witnesses. My later recommendations address this issue.

Though I find that this interview was powerful evidence as to Ms. Hester's unreliability and as to the conduct of the investigation generally, I

do not find that Ms. Hester's trial testimony originated as a result of this interview. As reflected in my summary of the evidence, I do accept that Ms. Hester brought her allegations to Fitzpatrick in writing, before this interview took place.

In summary, I find that Paddy Hester's evidence cannot be safely relied upon. Frankly, based upon what I heard at the Inquiry, it is difficult to imagine anyone placing any weight upon her evidence at the time. However, as I previously reflected, the three prosecutors at the second trial did not *know* that her evidence was false. They were told that she passed a polygraph test. They viewed her evidence as confirmatory of other evidence, such as that of McGowan (who also talked about the Morin 'stare') and Robertson. The prosecutors also viewed her evidence as confirmatory of the forensic evidence relating to the Honda. Of course, by the time Hester made her claim, she had the full opportunity to have learned what forensic evidence existed. The prosecutors did not have the February 1989 interview. The extent to which they discussed her unreliability with the investigating officers is unclear.

I find that the prosecutors did not objectively assess Ms. Hester's reliability. They easily discarded evidence which undermined her credibility They were not terribly interested in determining whether her evidence about her status in Naval Intelligence was true. Their role was seen as advocates in an adversarial system. It was for the defence to explore her unreliability. It was for the prosecution to resist in full adversarial fashion. I have already indicated that Mr. McGuigan could draw upon his formidable experience in assessing witnesses. He knew that Ms. Hester's testimony had certain flaws. I am unclear as to the extent to which he truly appreciated how flawed her testimony was.

Apart from Ms. Hester's unreliability, I am of the view that her evidence about the encounter with the Morins in the pickup truck should not have been admitted into evidence as yet another example of what was put to the jury as conduct or demeanour from which consciousness of guilt could be inferred. I need not decide whether the evidence could have been admitted at the instance of the prosecution to rebut Mr. Morin's position that he was home at the time Ms. Hester purportedly saw him.

(iv) Doug Greenwood and John Carruthers

Background Investigation

In 1984, John Carruthers, Doug Greenwood and Christine Jessop's father, Robert Jessop, were members of the Queensville Volunteer Fire Department. On learning that Christine was missing from her home, Greenwood and Carruthers joined other community members to search for Christine.

It was not until January 5, 1989 — almost four years after the arrest of Mr. Morin — that Detective Fitzpatrick was advised by Robert Jessop that Messrs. Greenwood and Carruthers claimed that they felt so strongly that Alphonse Morin was hiding something on the night of the search that they made a report to the York Regional Police force at the time. Inspector Shephard and Detective Fitzpatrick were unsuccessful in their attempt to find any documentation substantiating such a report to the York Regional police. In fact, on February 1, 1985, Detective Fitzpatrick interviewed Mr. Carruthers concerning a potential suspect who worked at his place of business. During this interview, Mr. Carruthers was neither asked, nor did he communicate, any particular observations he had made or concerns he had had relating to his search on October 3, 1984.

On January 13, 1989, Inspector Shephard and Sergeant Chapman interviewed Mr. Greenwood. A transcript of this taped interview reads, in part, as follows:

> Greenwood: Guy Paul wasn't there ... [Alphonse Morin] was the only one there [at the Morin property], we looked all over, we got quite interested in what he was doing because (sic) just seemed like everybody in Queensville was looking for this little girl except for the next door neighbour .
>
> .....
>
> And I know I got down in the tranch (sic) and wondered if he [Alphonse] was burying her or something at that point, ah, or hiding something in the concrete that he was pouring.
>
> .....

> [A]nd then he went and [testified] that he was out looking for this little girl and he sure wasn't that night[.] I heard him say that over the ... news that he was out searching for the girl but he sure wasn't. ... We thought it was him that killed her or took her at that point.

Inspector Shephard expressed his wish during the interview that "we had known about you and Ted four years ago." These two witnesses were able to testify during the second trial about Alphonse Morin's lack of interest in the search and provided information that Guy Paul was not working in the yard with his father, as he had claimed in his statement to the police.

Detective Fitzpatrick interviewed Mr. Carruthers in Western Canada (where he had moved in 1985) by telephone on January 13, 1989. His supplementary report reads, in part, as follows:

> We had information that Carruthers may have had some info re: Morins that night.
>
> Carruthers advised that he and Doug Greenwood felt that the family were acting unusual and they felt that they should check the house and as they were going to, someone stopped them and said that was the Police's responsibility. So they went and told their Captain who in turn told the police officer at the Jessop residence.

On November 11, 1991, at a meeting attended by Alex Smith, Ted Carruthers, Doug Greenwood and Detective Fitzpatrick, Mr. Carruthers provided a more detailed statement which contradicted portions of what he had said on the telephone. Detective Fitzpatrick's notes which record this meeting read:

> Carruthers stated he has thought about incident, and said some things different than report statement. Now remembers the sheets to windows, people peering out at others, etc.

Detective Fitzpatrick denied providing Mr. Carruthers with any information about what other witnesses, such as Ms. Hester and Constable Robertson, reported concerning the Morin family peering out of the window.

In the telephone interview, Mr. Carruthers said while the family was

acting unusual, he did not search the property. This is in contrast to his later statement in which he recalled spending some time searching the property.

During the Inquiry, Detective Fitzpatrick testified that the Carruthers and Greenwood evidence might be categorized as 'weird evidence,' as it presented an eerie view of what was going on at the Morins that night. Inspector Shephard testified that he accepted the evidence of Messrs. Greenwood and Carruthers, as these men were not overly suspicious, a symptom he had observed in various Queensville residents. He was not troubled that he could find no support for their claim that they had reported their concerns at an earlier time. In hindsight, Inspector Shephard thought he may have been overly accepting of the evidence because it pointed to Morin's guilt.

Trial Testimony

Messrs. Carruthers and Greenwood testified that they were on the driveway at the Jessop home in the evening of October 3, 1984, awaiting instructions, when they noticed a 55 to 60 year-old man, standing at the southwest corner of the Morin property. *He did not appear as concerned as others that evening.* He was working along the side of his house, digging and pouring footings. Beside him was a cement mixer which was running. No one else worked with this man, who remained outside for approximately half an hour. Greenwood testified that he remembered saying to the police that night regarding this neighbour: "Maybe he's down there burying the little girl."

Greenwood and Carruthers said they later walked over to the Morin property and looked in the backyard when no one was there. Two-by-fours held plastic which covered flood lights that had been left on near the house. An empty cement mixer near the house continued going around and around, rattling stones most of the evening. A trench had been dug along the south side of the house; concrete had been poured into the bottom of this excavation.

Guy Paul Morin said in cross-examination during the second trial that he stopped working in the yard at approximately 9:00 p.m. that evening. He was unable to explain why neither Mr. Greenwood nor Mr. Carruthers saw him working when they went on the Morin property to search. Both he and his father said that the men must have been mistaken when they testified there was a cement mixer on the premises: they did not own one at this time and

they were not using cement for their renovations; in fact they purchased a cement mixer a year after Guy Paul Morin's acquittal in 1986.

The two volunteer firefighters testified that at no time did they see Guy Paul Morin, or anyone else, in the company of the man they had seen. Even when they returned at 11:30 p.m. from searching for Christine, the lights were still on. No one, however, was working. By this time, Mr. Carruthers said, the Morins had placed curtains or sheets over the front window. On at least one occasion, someone peered out. He and a few firefighters went out searching again and returned at approximately 2:00 a.m. Again, he noticed someone peering through the sheets or curtains. The flood lights were still on.

Mr. Carruthers testified that subsequent to the initial contact with Detective Fitzpatrick in February 1985 (about a co-worker), over the next five years he received a number of telephone calls from the police. Towards the end of the trial, the Crown made an admission which the defence commented upon to the jury in the following words:

> Now I think, first of all, as a prelude to this re-examination, the Crown is prepared to admit as a fact that the first time any Durham police officers spoke to either Mr. Greenwood or Mr. Carruthers was sometime in 1989.

Messrs. Greenwood and Carruthers were forcefully questioned by Mr. Pinkofsky. Crown counsel Alex Smith told the Inquiry that a number of witnesses were cross-examined vigorously — and, in his view, unfairly — by Mr. Pinkofsky and he was surprised these two men were questioned so severely since he considered them to be 'straight-forward people' with no stake in the outcome of the case. He said that his experience with the Crown had taught him that people's evidence changes with time; it sometimes improves, at other times it worsens, but it rarely stays the same. Mr. Smith believes that once asked specific questions, a person's memory often improves because they are forced to focus on particulars. It was his opinion that the evidence of Greenwood and Carruthers was made into a greater issue than it deserved and thought the cross-examination by Mr. Pinkofsky got out of control. By way of example, he recalled that Mr. Carruthers was chided by Mr. Pinkofsky about his command of the English language:

> In putting prior statements to him or prior testimony, it

> was suggested that he had a very good grasp of the English language and Mr. Pinkofsky suggested that the witness certainly never failed English, and I recall the witness pausing and turning beet red and indicating that, in fact, he had failed English...

I will comment about the conduct of the defence later in this report.

Use of the Evidence by the Crown

In its factum for the Court of Appeal, the defence, *inter alia*, said this about the evidence of Messrs. Greenwood and Carruthers:

> In itself, the evidence of Greenwood and Carruthers was insignificant. It was, however, given considerable weight by the Crown in his closing address, and the trial judge in his charge.

According to the Crown, the significance of the evidence of Greenwood and Carruthers was this:

- neither saw Mr. Morin working outside of his home on the night of October 3, 1984, contrary to Mr. Morin's evidence;

- both remembered a cement mixer on the Morin property, contrary to the evidence given by Mr. Morin and his father;

- the flood lights were alight outside the house at 11:00 p.m., contrary to Guy Paul Morin's statement that he took the lights — he said they were tri-lights — into the house at approximately 9 p.m.

Much of the closing address of Mr. McGuigan in relation to Greenwood and Carruthers was used to correct misstatements Mr. McGuigan thought that Mr. Pinkofsky had made in his closing. He also said this:

> It is submitted that the family got together at some time and certainly prior to the alibi notice being sent out by the accused counsel to the Crown and concocted this alibi.

.....

> Let's testify [sic] that if the accused went shopping he couldn't get home until after 5 or 5:30. He gets home, has a nap, helps his father with the renovations. Would a man who just killed a little girl be helping his father with construction work? Problem: this trial, as you heard in cross-examination, neither Mr. Greenwood or Mr. Carruthers were ever called as witnesses at the last trial. Their testimony indicates that the accused was not out helping his father when they made their observations. You have not heard from any witnesses other than his immediate family that he was out working that evening.

Finding

I do not believe that Messrs. Greenwood and Carruthers knowingly concocted a story to help convict a person whom the police believed to be guilty. They were respected members of the community, volunteer firefighters, and when the word spread that their colleague's child was missing, they went at once to help in the search. However, there is no contemporaneous record of their recollections and, as indicated above, their account changed over time. There may be a question as to how much weight should be given to their evidence. However, I do not find any prosecutorial impropriety in dealing with this evidence.

(v) Leslie Chipman

Ms. Chipman's Evidence

Leslie Chipman's evidence at Mr. Morin's second trial was summarized by Leo McGuigan as follows:

> Leslie Chipman. Leslie Chipman was the 17 year old high school student who in 1984 attended Queensville Public School and was a classmate and close friend of Christine Jessop or, as she describes it, "I would probably say she was my best friend." They were the same age and used to play together either at the park or at Christine's home.
>
> She testified that approximately two weeks before October 3rd, 1984 she was at Christine's house after

school. She believes on that day that they met at the store, both were riding their bikes. Christine had taken the school bus home from school. She indicated that she and Christine were playing out in the Jessop driveway or looking out for squirrels when they observed the accused clipping the hedges on his property line at the back of his property, that is, behind his house. He said, "hello" and asked them if they would like to come over and talk.

She testified that they went on to his property and talked with him for about five to ten minutes. This conversation took place at the front of his property near the fence. She described how they left the Jessop property, went across into the Morin property and he came and met them. Miss Chipman states that the accused asked them what they liked to do, where they liked to play. He asked Leslie where she lived. She testified that during this conversation the accused had the clippers in his hand and he held them so tightly that his knuckles were white.

She testified that the very next day she saw him again and he was in his yard clipping the hedges again. As she stated it, "he was back at his hedges again" and he said "hello" to Leslie and Christine on that occasion. She testified that about a week before Christine was abducted, on the previous Wednesday, she believes, the accused again said "hello" to her and Christine and they said "hello" to him. She testified that the accused was clipping the same hedges again.

I submit to you that in my observation and I hope in yours, that Miss Chipman was quite truthfully recounting her experiences in meeting the accused in the two week period leading up to Christine's disappearance. That issue, of course, is something for you to decide based on the abilities that collectively you possess.

Why was the accused on three occasions during that period clipping the hedge between the Jessop and the Morin property? He denies that this happened. And I submit Miss Chipman is worthy of your belief in that regard. I submit that this was his vehicle for watching those two young girls.

Interviews

On October 3, 1984, Christine Jessop and her friend, Leslie Chipman planned to meet after school at the park to play with their dolls. Both would be there by four o'clock. Ms. Chipman estimates that she arrived between 3:50 and 4:00. She waited for some time, but when Christine failed to arrive, she returned home. She telephoned the Jessop residence several times, but did not receive an answer until 6:30 that evening.

In the weeks following Christine's disappearance, Ms. Chipman spoke to officers from the York Regional Police on several occasions. She told them that approximately a week before Christine disappeared, two men in a white sports car with tinted windows had followed her and Christine first to the park, then to the general store and finally back to the park. She also gave them information about other men speaking with them at the tennis courts.

After Ms. Chipman saw the television coverage of the arrest of Guy Paul Morin and realized that he was Christine's neighbour, she spoke with a friend about her contact with Mr. Morin in Christine's presence. Her friend relayed this information to the police, who interviewed Ms. Chipman on May 23, 1985. On that day, she provided a signed, detailed, five-page statement to Detective Raymond Bunce which included the following information:

> When we got to Christine's house I saw a boy about 20 yrs. old on his property clipping his hedges, by Christine's driveway so we put our bikes in Christine's garage. Then we walked outside. The fellow called us over asking "would you guys like to come over to my house in the backyard to talk?" ... While we talked with him, he always held on to his clippers so tight his knuckles turned white.
>
> .....
>
> The following day I was at Christine's house again and this fellow appeared to be [clipping] the hedge in the same area again and this time he just said "Hi Christine" and I walked over to talk with him over the hedge. Again he asked me where I lived and he also asked Christine what she was doing that night.
>
> .....

> Approx. 1 week later, this was on a Wednesday, I believe a week before Christine went missing, I was at Christine's house about at 4:00 p.m. and we played around on her front lawn while this fellow was clipping his hedge and he called to us and said "Hi."
>
> The next day I was with Christine and we just arrived at her house and this fellow was sitting on a chair in his backyard of his house. Then when he saw Christine and I arrived he got up and then went over and started clipping the hedge again.
>
> I recall that was the week Christine went missing.

Following her May 1985 statement, she was interviewed on at least seven subsequent occasions by police and Crown attorneys. While she was not able to be specific, she told the Inquiry that she was given the impression by some of the officers that Mr. Morin was 'odd,' and this, she said, influenced her to believe that he was, indeed, guilty of her friend's murder.

The manner in which the information contained in this statement was elicited from Ms. Chipman and subsequently used at Mr. Morin's second trial was discussed at the Inquiry. Ms. Chipman was 10 years old when she was interviewed in her home; there was no adult with her while she spoke with the officer. She said that, on reflection, she would have preferred that her mother had been present for the interview:

> I just think that my mom would have been able to stop me where it should have been stopped, rather than let questions keep coming and make me second-guess myself. You know, at ten years old, second guessing yourself is pretty hard to do.

Use of the Evidence by the Crown

John Scott decided not to call Ms. Chipman as a witness at the first trial. In part, his reason was that no other evidence supported Ms. Chipman:

> I had a little bit of difficulty, because there was no – Mrs. Jessop never mentioned anything about – on my recollection, at least, about Mr. Morin being in the area of the side there, property lines, or anything of that kind. So there was nothing else that supported. She was a young kid, and I chose not to expose her to the

> criminal process at that stage.

Mr. Scott also believed that he spoke with one of her teachers who also raised concerns about Ms. Chipman's credibility. Mr. Scott does not recall speaking to Mr. McGuigan about the hedge itself — though in his opinion it only amounted to a few sparse cedar trees.

During the preparatory phase for the second trial, Crown counsel reconsidered tendering the evidence of Ms. Chipman. She was interviewed by Leo McGuigan before the trial and his contemporaneous notes reflect this:

> - Hedge incidents.
>
> - She now thinks it's odd the number of times he was clipping his hedge.
>
> - Some of the incidents might be on weekends, not always after school.
>
> .....
>
> - Thinks now he was clipping his hedge so much, must have been watching her.

In June 1990, police officers spoke with Ms. Chipman's former principal at the Queensville Public School. He told them that she had a desire for attention: she would, for instance, pretend to be emotional about Christine and then, minutes later, play happily with other children. In his opinion, she would 'most definitely' exaggerate to gain attention. While Mr. McGuigan was aware of this report, he felt it was not unusual for a young child to be upset one moment and then to carry on with her classmates the next.

According to Mr. McGuigan, the importance of Ms. Chipman's evidence was that on three separate occasions Mr. Morin would have gone into his backyard to trim a rather insubstantial hedge when Christine Jessop appeared on the scene; this, to him, was strange conduct. While the 'white knuckles' were part of the scenario, Mr. McGuigan said that this description was not the purpose of leading Ms. Chipman's evidence, but was simply part of the narrative of an unusual event.

In Ms. MacLean's pre-jury charge submissions, she told the Court that she wished to delve into

> an area that deals with demeanor or conduct [of Mr. Morin] consistent with guilt.
>
> .....
>
> [T]he fourth example, your honour, is the Leslie Chipman evidence about the accused gripping the hedge clippers so tightly that his knuckles were white. Again, that was of course in the presence of Christine Jessop and that conduct, the Crown submits, would be conduct consistent with guilt.

Ms. Chipman's Evidence Before the Inquiry

At the Inquiry, Ms. Chipman initially made certain allegations against the police and the Crown attorneys. Primarily, she expressed doubts regarding the accuracy of her statements to the police as reported by them, and the manner of eliciting her evidence. This is a summary of what she said:

1. She was manipulated in her evidence; she felt this way as a result of how the 'hedge clipper' evidence was used at trial;

2. She initially said that the Crown attorneys and police embellished her answers to questions during interviews subsequent to 1985; however, after a review of both her original statement and her evidence at the second trial, she agreed that her evidence had not substantially changed from her original statement. She then commented that it was her original statement that was embellished;

3. The police and Crown attorneys were not interested in her evidence relating to the timing of her arrangements with Christine Jessop and subsequent telephone calls, nor of suspicious sightings, but rather focused on her hedge clipper evidence. When it was pointed out to her that discussions of timing and cars were recorded in many of the supplementary reports, she was unable to explain why she had made such a statement in an affidavit for defence counsel and during an interview for 'The Fifth Estate';

4. The main thrust of Ms. Chipman's evidence was that the 'white knuckle' comment took on inordinate importance, to

the point that Ms. Chipman felt obliged to repeat that evidence during interviews and in her testimony.

Ms. Chipman told the Commission how interviews with her had been conducted, and she discussed the evolution of her evidence relating to the hedge-clipping incident:

> Q. How did the information about the hedge come up?
>
> A. I guess they just had asked me what he was doing, maybe, when I saw him ... And that's how it came up: When he was in his yard, what was he doing? I think he was clipping his hedge. It wasn't a huge thing to me, so I would just try and think about it, and between myself and between them, we decided what he was doing next door.
>
> Q. Just a minute, "*We* decided what he was doing next door"; what do you mean by that?
>
> A. I guess whatever they asked me, I would think - you know: Well, was he cutting his hedges? Yes, I think he might have been cutting his hedges. So all of a sudden: Yes, he's definitely cutting his hedges. Well, was he holding the hedge clippers tightly? Well, I don't know. Well, were his knuckles white, did they look like this?
>
> And he would show me - you know, he showed me what it looked like to have a clenched fist and as far as I'm concerned right now, when I look at something it doesn't look any different to me at all. But when he put it across to me, yeah, sure, okay. Yes it did look like that. You know — like he — they just seemed to sort of direct me with the questions.
>
> Q. Well when you say direct you with the questions, am I to understand what you're saying today is that when you first spoke with the officer, you weren't even sure of whether or not he was cutting a hedge. This was something that was decided? Is that what you're saying?
>
> A. Yeah, yes. It was — like, process of elimination. Well, was he cutting his lawn? No. Was he standing

> next to his fence? Yes. Could he have been cutting his hedges? Yes. That seemed to the way that the line of questioning would go [sic] and from that, we would determine what I thought I saw or experienced with Christine's neighbour.

And later:

> Q. How is it that the evidence regarding his knuckles being white with the clippers get to be in your statement if when you first spoke with this officer you didn't even recall what it was he was doing in the backyard when you spoke with him briefly?
>
> A. I don't know. I can't – I don't remember if they asked me if he was holding the hedge clippers, or if we just determined that he was, or – I don't remember how he got about to determining that yes, he was holding the hedge clippers. We talked a lot about it.

During her later cross-examination before this Inquiry, she stated that this evidence may have simply arisen as a result of her trying to picture the event in her mind as opposed to suggestive questioning by the police.

Ms. Chipman also initially told the Inquiry that approximately a year before she testified at the second trial, she felt that she was being manipulated, but she did not advise the Crown attorneys or the police because she was 'scared.' Speaking about her recollection of the hedge incident was upsetting for her, she explained, because

> I guess it's something that's bothered me for a long time, because I don't feel that it was totally truthful, or that it was accurate, I guess, is more the word when it came across when I testified [sic] and I guess even when we decided what had actually happened, I don't think that it was very accurate. ... It, being the hedge clippers. I think the whole focus on that is just wrong. I don't think it's accurate.

Under cross-examination by Mr. McGuigan's counsel, Ms. Chipman reviewed her May 8, 1985 statement and was asked about virtually every paragraph. Her responses were dotted with "I don't remember" and admissions that she lied in part. She also stated that she never saw Mr. Morin hold the clippers. This is an excerpt from her cross-examination:

> Q. Did you say "I recall that he did seem to be holding his shears very tightly when he talked to us."
>
> A. I said it, but I don't remember it.
>
> Q. All right. And that's not true, that's the lie under oath; is that correct?
>
> A. It's not accurate.
>
> Q. It's a lie under oath.
>
> A. It's not accurate.
>
> Q. Well there's a difference between something not being accurate and something being a lie. I'm suggesting to you that when you say, I recall that he did seem to be holding his shears very tightly when he talked to us, is a lie.
>
> A. Okay.

Ms. Chipman did not ever tell police officers or any Crown attorneys that she had any concerns as to the accuracy of her initial statement before she gave evidence at the stay motion in July 1990 or the second trial in February 1992.

Susan MacLean said that Ms. Chipman gave Crown counsel no indication that she was not telling the truth or that she felt her evidence was being misconstrued. By the second trial, Ms. Chipman was approximately 17 years old; Ms. MacLean was not concerned about her previous school principal's opinion based on contact he had with her a few years earlier. She "appeared to have grown out of that" by the time Crown counsel met with her in preparation for the second trial. In Ms. MacLean's opinion, while her evidence was thought to have significance, it was a minor part of the prosecution's case.

Mr. Smith was asked his opinion of the position taken by Mr. McGuigan relating to Leslie Chipman in his closing. He said:

> I would not promote the white knuckles as evidence of consciousness of guilt, but I would not tell Ms. Chipman: Don't mention the white knuckles. That's part of her evidence, and I think you've got to be pretty

> careful in saying: Don't mention that, because that's neutral evidence.
>
> I mean I don't think the white knuckles was a big deal, and frankly, I never did think the white knuckles was a big deal. And I clearly would not call it as evidence of consciousness of guilt.

Findings

Ms. Chipman's demeanour when she testified before the Inquiry was very emotional. She had clearly thought about the implications of her evidence in the years which followed her testimony, and while she appeared to be an honest witness with a genuine desire to help the Commission, I find it somewhat difficult to rely upon all of her assertions. This is not to suggest that she in any way lacked good faith, but the struggle within her, if I may put it that way, that she may have helped to convict an innocent person — and, indirectly, thereby let her former best friend's killer escape — make it difficult to separate fact from faulty perception.

Ms. Chipman was interviewed on a number of occasions by investigators and prosecutors. During her evidence, she made several serious allegations against the authorities who collected her evidence and prepared her for trial. This was said to explain why her evidence at Guy Paul Morin's trial was untrue.

I do not take from her evidence at the Inquiry that she deliberately lied at Guy Paul Morin's second trial. Instead, I take from her evidence that she came to believe, and to communicate to the Court, things about Guy Paul Morin which, on reflection were untrue. She was swept away by the accusation against Guy Paul Morin. I accept this aspect of her testimony completely.

The real issue is the extent to which the authorities were responsible for her coming to believe in facts that were untrue. This is where I have difficulty (despite her complete good faith) in relying upon her evidence.

The evidence suggests that she came forward to the police with an initial claim. The police did not induce that claim. Instead, it is explained by her very young age and the inclination to perceive events, coloured by the charge against Guy Paul Morin and the swirling speculation and innuendo in

the community. However, a number of interviews followed. None of them were videotaped. No parent was present, despite her tender age in the early stages of the process. Her recollection 'improved' through the process. By the time she testified, she had a detailed recollection not only of the 'white knuckles', but of specific and varied times when Morin viewed Christine Jessop and her while working on his hedge. Mr. McGuigan's notation of his preparatory interview reflects that "she *now* thinks it's odd the number of times he was clipping his hedge" and "thinks *now* he was clipping his hedge so much, he must have been watching her." Though the content of that notation does not reflect a great deal of new information (and indeed the full content of his notes was not lead from her), the notes do reflect a certain evolution in the strength or force of her testimony.

I do not believe that police or prosecutors told Ms. Chipman what to say. I also do not believe that police or prosecutors *knew* that her recollections were false ones. She admitted that she never indicated that to them either. I do find that the interviewing process by the authorities contributed to the added strength and detail in her trial evidence and that this may have been brought about through very pointed questions which she may have felt constrained to answer. I have no doubt that Mr. McGuigan, given his considerable skills as an advocate, could 'squeeze every drop' from a witness, without violating any ethical rules. This was a highly impressionable witness, who was very young at the material time, who regarded the police and prosecutors with respect and awe, was alone with them, who wished to assist and who was coloured by the charge existing against Guy Paul Morin. As well, her evidence was based upon impressions of what were then insignificant moments, where subtle changes in her evidence could turn her observations from suspicious conduct (even assuming it showed that much) on Morin's part to complete innocuousness. In those circumstances, the importance of the interviewing process is manifest; the dangers of suggestibility considerable.

Again, it is my view that this evidence should not have been introduced and used in the way that it was. Further, it is clear that extreme care is needed when dealing with the evidence of children, and this must begin at the very first interview. Certainly, an adult should have been present, even if this would have meant a delay. John Scott chose not to lead her evidence, and then, as well as in retrospect, this was a sound decision. But, as I said before, I am not prepared to say that the Crown's decision to call the then 17-year-old Ms. Chipman on the second trial was improper. It may have

been unwise, and it may have been an unfortunate exercise of discretion, but the trial judge permitted it and thus it became one more item in the list of events which the Crown — and the Court — considered evidence capable of demonstrating Mr. Morin's guilt. I repeat, once again, that my later recommendations will address this issue.

(vi) Evidence of Funeral Night Screams

Introduction

On January 7, 1985, Christine Jessop was buried in the cemetery in which she used to play behind the Jessops' home. After the funeral, friends and relatives congregated at the Jessop residence.

During the second trial, Janet Jessop testified that she and some guests were in the den at approximately 7:00 p.m. when a scream was heard coming from the north of her house. She ran outside with three of the visitors. A male voice screamed "Help me, help me, Oh God, help me." She described it as sounding frightened, troubled or scared. Ms. Jessop said that she recognized it as Guy Paul Morin's voice. She and her brother-in-law, Wally Rabson, Barb Jenkins and Wally's brother, Lloyd Rabson, went to the driveway, looked around, but saw nothing. Snow had fallen that day but had stopped by this time. Ms. Jessop then heard footsteps in the snow and saw a silhouette of a person moving quickly into the back door of the Morin house. She asked, "Can I help you?", "Are you alright?" and "Does anyone need help?". She did not think she used Guy Paul's name. There was no reply. As no one answered her call, she assumed everything was all right. The group remained outside for a minute before returning indoors. Ms. Jessop testified that she and her husband reported this to the police later that evening or the following day.

Following Ms. Jessop's testimony at Mr. Morin's second trial, the Crown made an admission that no Durham police officers who interviewed Janet Jessop regarding these screams recorded information about hearing the sound of a person running in the snow or seeing a silhouette or a shadow.

John Scott was unaware of this matter and therefore no evidence about it was led at the first trial. No police officer was ever found to whom the event was reported on the night on which it would have occurred or the following day. The first recorded police documentation of the incident was

when Janet Jessop spoke with Detective Bunce of York Region on May 24, 1985, over a month after the arrest of Guy Paul Morin. He recorded that Ms. Jessop told him that Wally and Lloyd Rabson "had heard *someone* yelling very loudly, 'help, help'." (Emphasis added.) His report did not indicate that Ms. Jessop, too, had heard this.

Constable Bunce's supplementary report was read to Ms. Jessop during the Inquiry. She said it was possible that she did not tell him that she had personally heard the screaming, or that the words had included the reference "God, God, ... Oh God," or that she had personally observed the Rabsons run outside and that she had accompanied them.

Detective Fitzpatrick's September 21, 1989 supplementary report reflects that he had "received information from Janet Jessop sometime ago" that on the night of the funeral she and others, including Lloyd Rabson, heard someone yelling "God, God, help me, Oh God help me". She and others went outside and saw footprints in the snow leading towards the Morin residence. The report further reflects "Janet *now* feels that the person she heard that night was Guy Paul Morin. She states she knows his voice". Detective Fitzpatrick could not recall how long before he prepared his 1989 supplementary report that Janet Jessop had originally related the information to him. He had not made a note or report because it was not until Ms. Jessop advised him that she identified the voice as that of Guy Paul Morin, and provided the names of the others who had heard the screaming, that he viewed the evidence as important.

During the Inquiry, this, too, was read to Janet Jessop. She said that she never 'saw footsteps' as indicated in Detective Fitzpatrick's report. She agreed it was possible that she first reported her identification of Mr. Morin's voice to Fitzpatrick in September 1989. Although she may have communicated to Detective Fitzpatrick that it was only 'now' that she could recognize the voice, she said "I had a feeling all along it was him." Ms. Jessop agreed that her strong view that a guilty person had been acquitted may have played some role in the accuracy of her recollection about the incident, but she was adamant that "I know I heard the screaming." She said that although the day of her daughter's funeral was emotionally tumultuous, the screams she heard have "stuck in my mind."

Detective Fitzpatrick told the Commission that he had concerns about the reliability of Janet Jessop's evidence in light of the fact that he had

spoken to Ms. Jessop on many occasions about this incident, but had not previously been told that she recognized the voice as that of Guy Paul Morin. Similarly, Inspector Shephard said that he, too, was sceptical of the evidence. Although he could not recall doing so, he probably expressed this scepticism to his partner. He could not specifically recall discussing it with the Crown attorneys. He acknowledged that he may have been overly accepting of the evidence because of his belief that Mr. Morin was guilty.

The Evidence of the Rabsons and Barbara Jenkins

Wally Rabson was formerly married to Robert Jessop's sister. In January 1985 he had a common-law relationship with Barbara Jenkins. Lloyd Rabson is his brother. All three claim to have been in the dining room when they heard a cry from the north of the house. There were as many as 30 people in the room at the time, but only these three testified during the pre-trial motions. The sound they heard was something to the effect of "God help me, oh please, God help me." Lloyd Rabson thought these were the precise words. He described the voice as being high-pitched, as if the person was troubled, scared or frightened. Ms. Jenkins described it as a male voice, "a plea, a distress, desperation." They went outside. Wally Rabson described it as "the type of night that you could hear for miles." He thought the noise had come from children playing outside on a toboggan. Children often played in the cemetery behind the Jessop house. Wally Rabson and Barbara Jenkins both initially stated that they could not recall Janet Jessop going outside with them.

No one seemed to have attached much importance to the event until September 1989, when Detective Fitzpatrick first contacted the Rabsons by telephone. The only previous reference to this incident in the police records was the report of Detective Bunce speaking with Janet Jessop about this on May 24, 1985.

On May 29, 1991, the Rabsons and Ms. Jenkins met with Detective Fitzpatrick in a bar in London the night before they were to testify on the stay application. According to Lloyd Rabson, Janet Jessop was also there for part of the time. During the meeting, Detective Fitzpatrick read out everyone's individual statement in the presence of all the others. Lloyd Rabson described the scene:

Q. [Detective Fitzpatrick] had copies of statements

> that he recorded ... in the form of a statement and he had copies of those statements and he read them out to you?
>
> A. Yes he read them to us.
>
> .....
>
> Q. So it is correct if you wanted to listen it was there, each of you knew what the other was saying to Detective Fitzpatrick according to those statements. Correct?
>
> A. Yes, correct.

Detective Fitzpatrick said in relation to this:

> If someone was to suggest that I had a drink with them, yes, I would have a drink with them sir. Mrs. Jessop wasn't there. I had a drink with the Rabsons. I did have the reports that I had typed out with me when I did have a drink with them. I never did sit and read their reports out to them. I spoke to them individually. All three were there and I asked them if they could just relate to me, if they recalled the information that they had given to me, and I may have asked them if they recall saying such and such. I am sure I had conversation with them.

Mr. Morin testified during his second trial that, at the time of Christine's funeral, his parents were on vacation in Bermuda and he was in the house by himself. He denied shouting the night of the funeral, nor did he hear any screaming that evening. The only time he would have been outside that night was to let out the dogs.

Mr. Morin's factum for the Court of Appeal says this about the funeral night screams:

> This delayed investigation [into the funeral screams] meant that the civilian witnesses' original statements were prepared up to *five* years after the event. The Rabsons and Jenkins all admitted discussing the incident amongst each over the years. In addition, their memories may well have been affected by the "joint" interview of them with Fitzpatrick in London in

> preparation for their evidence during the pre-trial motions. As regards the frailty of four to five-year memories, the trial judge made no comment. As regards the "joint" interview in which the statements of each witness were read out by Fitzpatrick in the presence of others, the trial judge referred to this evidence elsewhere in the charge only in the context of the defence alleging an attempt on Fitzpatrick's part:
>
> > "to influence the evidence ... about the screams heard on the night of the funeral," and that "a variety of witnesses, including Barbara Jenkins, the Rabsons, Janet Jessop ... denied any attempt by investigators Fitzpatrick and Shephard to influence their testimony".
>
> *The trial judge had said this a day earlier in his charge in a section unrelated to the funeral night screams evidence*. He never suggested to the jury at any time that, regardless of motives, the joint session may have affected the memories and evidence of the witnesses.

Crown Use of the Evidence

As noted above, the funeral night screams were not raised at the first trial as John Scott was not aware of this evidence. He was only told about the details of this occurrence in 1989, just prior to the end of his carriage of the case.

Ms. Jessop's evidence as to the identity of the screamer was the subject of a lengthy exclusion application by the defence on the basis that it was unreliable. The evidence was ruled admissible, however, and the issue of reliability was left for the jury to determine. It was tendered as evidence of 'consciousness of guilt.' Mr. McGuigan acknowledged that trial judges then had, and have now, very limited powers to exclude evidence because of its reliability, even if a judge were persuaded that evidence proffered was patently unreliable.

The Crown admitted at the second trial that the aspect of Janet Jessop's evidence of hearing footsteps and seeing a silhouette first came to the Crown's attention in May, 1991 when she testified on the pre-trial motion to exclude the evidence of the funeral night screams.

Counsel for the Morins took the position that Janet Jessop's evidence was confabulated; she convinced the Rabsons and Ms. Jenkins years after the event that it was significant.

The position of Mr. McGuigan and Mr. Smith in written submissions before the Commission was that although there was a concern with the accuracy of Ms. Jessop's recollection on the funeral screams, none of the Crown attorneys thought she was fabricating this evidence. While Mr. McGuigan believed that Janet Jessop could have recognized Mr. Morin's voice and may have seen shadows, the one area that concerned him was 'hearing footprints,' as she called it:

> Q. Now, you believed, I take it, at the second trial that Guy Paul Morin had indeed screamed that night?
>
> A. Yes.
>
> Q. And what I want to ask you is this: Leaving aside that belief, did you also believe that Janet Jessop had not only heard some scream outside that night, as the others had described, but that, indeed, she could recognize the screamer's voice as Guy Paul Morin's, that indeed she had, in reality, heard these footsteps, and that indeed, in reality, she had actually seen this silhouette enter the Morin residence?
>
> A. Well, I believed that she could recognize the voice. the other -- the footsteps, hearing the footsteps was somewhat problematic. The silhouette, I think the word silhouette may exasperate the situation. I take it what she means is shadows, and I thought that could very well be possible. But I had a lot of trouble with the hearing footprints, because there was a fairly heavy snow that had been there that night.
>
> .....
>
> Q. [D]id you have any concerns about the reliability of her evidence that indeed she could actually recognize this scream that had been heard as being the voice of Guy Paul Morin?
>
> A. [T]here was emotion in regard to that, if I'm not mistaken, in which the issue of expertise in recognizing voices was part of the issues that were raised. And as I recall her evidence, and I can't recall it all, but I recall

that she was familiar with ... having heard him yell when he was in his own backyard on other occasions, when they were neighbours.

And that she was, therefore, familiar with him, how he sounded when he raised his voice to what we'd call, I suppose, a yell. So that that was argued and the judge indicated that that evidence -- she could give that evidence on that particular issue. But I have to tell you that the fact that the scream came from Guy Paul Morin, and now again, I'm going back to my thinking at that time, was not a big problem because I think circumstantially it was established that it would have been Guy Paul Morin. and I'll go into that if you'd like me to.

.....

Q. I think I can assist you by saying that it was your position that apart from what she had to say about it, one could look at the direction that it came from and the fact that he was alone at home that evening, and so on, and other pieces of evidence as circumstantial support for the fact that, indeed, it was Guy Paul Morin. And that's what your referring to, I take it?

A. That's right. I think there's a very strong circumstantial case that could be made.

.....

Q. Did you not, in light of the fact that after she had spoken to the police so many times without identifying Guy Paul Morin as the person who had been the screamer, and after having spoken to the Crowns a number of times without having mentioned the fact that she could actually identify Guy Paul Morin as the screamer, surely you must have had some concerns about the reliability of ... this lady claiming that she could identify the voice as Guy Paul Morin's.

A. Well, I think you're — I was assisted in this by the circumstantial evidence that if it was him, and she said she heard him, it's more likely she did hear him.

.....

Q. And the third aspect of this, that she had actually

seen this silhouette — and whether we call it a silhouette or a shadow, and I believe she did refer to it as a silhouette, but she'd actually seen the silhouette of presumably the screamer enter the Morin residence.

A. Yes.

Q. Did you have no concern about the reliability of that evidence?

A. Well, I mean, if it's a shadow, you know, I really didn't — I didn't think that was of much consequence in any event. But whether she saw a shadow or didn't see a shadow, ... I believed that she may very well have seen a shadow, but I didn't direct my mind to it in any great detail.

.....

I mean, by silhouettes, I take it as being, it's more understandable to me to be talking about shadows.

.....

I didn't think it was that important and I thought that, you know, that was something, I suppose, for the jury to consider, given our acknowledgment of when it was reported.

.....

Q. But I'm saying from Janet Jessop's perspective, did you really believe that back during the day of, that she had actually come to the conclusion that it had been Guy Paul Morin who she could identify as being the screamer and running into the door and through his arrest and through his prosecution at the first trial, and so on and so forth. She never told the Crowns, or she never told the police, but had reported it back when on the day of?

A. Well, Mr. Sandler, the alternative to this, and I accept it other than the issue of the footprints because I couldn't understand how you could hear footprints. I accepted, basically, her evidence in this regard. My alternative would be to go to the victim, the mother of the little child, and say, I think you're lying, I'm not going to call you on that. And given how I looked at it,

that was not an alternative for me.

Q. Well, is there another alternative? I mean, first of all, are you entitled to go to the jury and say, well, you know, you may feel that in light of the fact that there's no contemporaneous record, and that in hundreds of meetings with the police and Crown, she never mentioned her recognition of this [as] Guy Paul Morin, or the silhouette entering the Morin residence, or having heard the footprints.

And in light of my admission that she never claimed any of this stuff until the pretrial motion, did that aspect — those aspects, I'd invite you not to act upon?

.....

A. I'm suggesting that that's the job of the defence counsel.

.....

[I]n the charge screening [directive], the issue of credibility is discussed. And the Crown is not to usurp the trier of fact from determining the credibility of an issue. They are not to take that upon themselves, and they will not call [the evidence] if there's something obviously wrong with the essential evidence that is being called.

In this case I believed that the screams that were reported were made, because we had three people, two in particular who heard the words, and very closely resembled each other. We had the - I was convinced that they came from Guy Paul Morin. Now, you have the screams and you have the timing and you have what was said.

To me that's the essence of that evidence, whether there's shadows, whether she saw shadows, didn't see shadows, didn't hear footprints, is something that the jury can determine on their own from that. And so, and as I say, because she said there was shadows and she heard footprints, to go and say you said that, we think you're lying, we're not going to call this, is just not – just not realistic in the circumstances when it's the mother of a murdered nine year-old girl.

.....

Q. Just based upon your view as to the footprints -- and what I hear you saying is that, at least insofar as the footprints were concerned, you had a real skepticism as to whether she could have heard footprints in the way she described; right?

A. That's correct.

Q. What did you chalk that up to? What did you think was happening?

A. Well, I don't know if I ever thought ... what was happening. I mean, in what regard?

Q. I mean, here you thought that you were really skeptical about whether she could really hear footsteps in the way that she described. What did you think was happening? I mean, did you think she was lying? Or did you think she was honestly mistaken? Or just, kind of overreaching a little bit to help the Crown's case? I mean, what was the thought process?

A. I didn't really consider that.

Q. Not at all?

A. No.

Mr. McGuigan said it was open for a Crown attorney to believe some, but not all of a witness' testimony and still call the witness, as long as the important evidence was believed.

Mr. McGuigan recalled that Officer Bunce had told him that Ms. Jessop may have conveyed to him information about the incident which he did not record. At that point in time, Mr. McGuigan added, Mr. Morin was simply a neighbour, not a suspect. He stressed the Crown's obligation not to call evidence if it was believed to be not true; however, in light of his basic acceptance of the *essence of the evidence*, McGuigan viewed it as the role of defence counsel and the jury to address aspects of the evidence which were suspect.

As discussed in the General Investigation section of the Report, during the Inquiry, Brian Gover said the prosecutors 'had concerns' about

Ms. Jessop's volatile nature and the reliability of her 'evidence.' He added that Mr. Scott had warned him to be vigilant in ensuring that Ms. Jessop related only information within her personal knowledge. Mr. Gover also said that he was told by Mr. Scott that Janet Jessop would occasionally ask questions in the course of a witness interview, apparently designed to elicit information that had an impact on her evidence. Mr. Gover was cautioned to be careful with Ms. Jessop because of her "willingness to buttress her evidence by going beyond personal experience."

As stated elsewhere, when Mr. Scott was questioned during the Inquiry he could not recall this warning but stated that it was consistent with his beliefs. Scott further stated that while Ms. Jessop might try to 'fill in the blanks' of evidence he did not believe that she would intentionally mislead the prosecution.

Mr. Scott did not specifically recall but conceded that he may have had conversations with Mr. McGuigan about his concerns relating to Janet Jessop's propensity to expound and expand on the evidence.

Mr. Smith recalled many frank discussions between Mr. Gover and himself on a number of issues. In terms of Ms. Jessop's credibility he said:

> I certainly had concerns about Mrs. Jessop and my concerns had to do with her emotional fragility. I never recall coming to the conclusion that Mrs. Jessop would do anything or say anything to convict Mr. Morin, and I certainly would not have been in a position to tell Mr. Gover that at interviews, Mrs. Jessop would have the habit of asking me questions to elicit information, because I hadn't at that point interviewed Mrs. Jessop at all.

Mr. Smith had no recollection of telling Mr. Gover that Ms. Jessop was capable of saying unreliable things to implicate Mr. Morin. When asked if there was a feeling on the prosecution team that Janet Jessop would say anything to further the case against Mr. Morin, he replied: "I don't think so."

Mr. Gover said that he was aware that the substance of the evidence of the funeral night screams surfaced between the first and second trials; it was his view that the evidence had little value, if any:

> [H]ere was something that Mrs. Jessop claimed to have recalled, not at a time when it happened, and of course when the investigation was ongoing, not when Mr. Morin came to be arrested, and he was the next door neighbour, not when he was arrested three months later. Not when she testified apparently at his first trial, but far down the road when there emerged problems in proof of the Crown's case. It struck me as evidence that was highly doubtful.

Mr. Gover said that, perhaps he should have raised his concerns about her, but that,

> [i]n large measure, I was deferring to the greater experience of Mr. McGuigan in cases of this type ... they had spent more time with her in preparing her to testify than I had. And there may well have been some other criteria that they had for believing the evidence.

Mr. Gover did, however, add that he "would have been loathe to lead the evidence of the funeral screams." He agreed that the consequence of calling evidence of this type was to put a lot of witnesses on the stand and have the defence allege that they were all not truthful. He agreed with the notion that this permitted the Crown to suggest that the defence was making 'paranoid' allegations of conspiracies and that such a result would be within the "predictability of the mind of an experienced prosecutor."

Mr. McGuigan told the Inquiry that his only contact with Ms. Jessop was in casual conversation and his preparation of her evidence at trial. Although it was obvious that she thought Mr. Morin was guilty, Mr. McGuigan did not have the impression that she was prepared to do anything improper to convict Guy Paul Morin. He found Ms. Jessop difficult to interview because her ideas were scattered. He testified that he was not aware of a view amongst the prosecutors on the case that Ms. Jessop's credibility might be an issue. He claimed that he did not know Brian Gover had been warned about Ms. Jessop's credibility. In his view, these concerns should have been brought to Crown counsel's attention.

Mr. McGuigan's closing address on this issue was read during the Inquiry. McGuigan reviewed Ms. Jessop's evidence and set forth his submission that apart from the voice identification, there was a strong circumstantial case that the voice she heard was Mr. Morin's:

> Janet testified that she heard footsteps in the snow and observed a silhouette run in the backdoor of the Morin house. She called to see if anyone needed help, and she got no reply. Now all who heard this screaming or shouting agreed in their testimony that one, the voice was male; two, it was a voice in fright or distress or desperation and that it came from outside and from the north. And there was no evidence as to whose voice that was and the voice didn't come from the Jessop property, the property immediately to the north is where the accused lived.
>
> In his testimony he indicated to you he was home that night and he was home alone. And without any identification of the voice, circumstantially, I submit to you, that an inference can be drawn that the person responsible for that outcry would be the accused before the court. Janet Jessop who was familiar with the accused's voice when he was speaking normal from neighbourly contacts and also when he would raise his voice in his backyard for whatever reason recognized the voice and positively identified it as that of the accused.
>
> .....
>
> Wally Rabson testified in this court that he told a plain clothes officer at the Jessop residence that evening and that the officer did nothing. Janet Jessop testified that she and her husband either that night or the next day reported the incident to the police. She testified that there was never any doubt in her mind from the first time she heard the screams that it was the accused. And I submit to you that, as I said previously, that the accused was at home alone in his residence that evening, and he confirmed that himself in his testimony.

In his evidence before the Commission Mr. McGuigan was asked:

> Q: ...[I]f one takes the natural consequences of one actions when you tell a jury four or five things as part of the evidence, absence (sic.) from a disclaimer, one might expect a jury to regard that as your position that the evidence is worthy of some acceptance. That's all.
>
> A: Yes. I guess that's true.

While the trial judge made no comment on the 'late revelation' aspect of this evidence during the section of the charge which dealt with the funeral night screams, he said, during a later portion of his charge:

> If you reject Mrs. Jessop's and/or Mrs. Hester's evidence on the early reporting, you are invited to consider the late reporting of the information in assessing weight relative to that evidence. You may apply similar considerations to any cases of late recollection that you find on the evidence.

Findings

Ms. Jessop testified twice at the Inquiry. Some of her evidence was challenged by counsel for police or prosecutors, particularly as it related to her allegation that Fitzpatrick had discussed the offer made to May and X and as it related to her evidence on the timing issue. These aspects of her evidence have been explored elsewhere in this Report. The cross-examinations of Ms. Jessop were done with courtesy and utmost professionalism. No one relished the prospect of confronting or demeaning Ms. Jessop. The tragedy she has gone through is monumental. There can be no greater loss to a parent than a young child, particularly under these circumstances. It follows that the apprehension and conviction of her daughter's killer assumed great importance. The arrest and prosecution of Guy Paul Morin undoubtedly focused her anger upon him — understandably so.

I accept Mr. Gover's evidence that John Scott had warned him to be vigilant in ensuring that Ms. Jessop only related information within her personal knowledge. Mr. Gover was also told by Mr. Scott that Janet Jessop would occasionally ask questions in the course of a witness interview, apparently designed to elicit information that had an impact on her evidence.

One could construct an argument that the funeral scream evidence had some credibility because it came from several people, Guy Paul Morin was home that night, and because it tracked other utterances allegedly made by Mr. Morin. Despite the very significant problems with this evidence, including its untimely reporting, at least one collective discussion with the witnesses who gave this evidence, and other inherent difficulties with it, I again am not prepared to say that the prosecutors engaged in misconduct by calling the funeral scream evidence.

However, Janet Jessop did not simply articulate the hearing of the scream from a certain direction, as the other witnesses did. She claimed that she heard 'footsteps in the snow', saw a silhouette of a person moving quickly into the back door of the Morin house and could identify the voice as that of Guy Paul Morin. There was no record of any contemporaneous suggestion to this effect by Ms. Jessop. Her identification of Guy Paul Morin as the screamer was not brought to anyone's attention for years thereafter, even though Ms. Jessop met with police and prosecutors on a regular basis and was highly motivated to assist the prosecution. It was only after Guy Paul Morin's acquittal that these claims came forth. Some aspects were only revealed to the Crown during the second trial proceedings. Mr. Gover indicated throughout his evidence that he recognized, and was prepared to defer to, Mr. McGuigan's greater experience as a trial counsel. He was most complimentary of Mr. McGuigan. However, it was abundantly clear to me that it was extremely unlikely that he would have tendered Ms. Jessop as a witness to these purported funeral screams.

Ms. Jessop did not hear or see footsteps in the snow, see a silhouette of a person moving quickly into the back door of the Morin house and could not identify the voice as that of Guy Paul Morin. Fueled by her understandable rage towards Guy Paul Morin and her concern that he not be again acquitted for Christine's murder, she may have convinced herself that she had seen and heard these things. Objectively viewed, this aspect of her evidence, given all the circumstances outlined above, was patently unreliable. An experienced counsel should have known that. Mr. McGuigan indicated that he had some scepticism about her evidence that she heard the footprints in the snow. However, he gave no thought to why she was giving that evidence. Otherwise, he said that he accepted her evidence, because it was circumstantially supported. As for the other problematic aspects of her evidence, those were for the defence to address and the jury to explore. He said it was unrealistic to go back to the mother of a murdered child and tell her that the evidence would not be led because she was lying.

I have earlier found that Mr. McGuigan knew that Ms. Jessop's evidence that she threw away the clock was untrue, if not before she testified, then during her testimony. His scepticism about her funeral scream evidence extended only to the footprints in the snow. If true, this again was tunnel vision of the most staggering kind. Her claims, objectively viewed, compelled a careful and introspective consideration of whether she should be called as a witness or, once called, whether the Crown should place any

reliance upon her evidence before the jury. Mr. McGuigan did not have the requisite objectivity, as did, for example Mr. Gover and as Mr. Scott may well have, had Ms. Jessop made these untimely claims to him. An objective assessment, giving full value to the Crown and defence roles in an adversarial proceeding, may well have compelled the Crown to advise the jury that aspects of Ms. Jessop's evidence, albeit perhaps well-intentioned, could not safely be relied on. He could still invite the jury to infer that the screams did occur and came from Guy Paul Morin on the remaining evidence. This approach would not compel the Crown to call Ms. Jessop a liar, as suggested by Mr. McGuigan.

The 'funeral night scream' were yet more evidence led to show Mr. Morin's 'consciousness of guilt.' Its reliability was highly doubtful. As is demonstrated in this chapter, the evidence led to permit an inference of 'consciousness of guilt' or 'consistency with guilt' was often unreliable or, in other instances, of so little probative value so as to be worthless. Nonetheless, the cumulative effect of this evidence must have impressed itself upon the jury. This cumulative effect likely gave it a credibility and importance that it did not deserve.

(vii) Mandy Patterson

Ms. Patterson's Evidence

Mandy Patterson and Guy Paul Morin played the clarinet and shared a music stand in the Whitechurch-Stouffville Concert Band. The band usually met to practise on Monday evenings. In August 1984, Ms. Patterson left the band to get married. She returned in February 1985, approximately four months after Christine Jessop had disappeared from her home. At that time she spoke to Mr. Morin about Christine's death. She claimed that the issue appeared to upset him and she got the distinct feeling that he did not want to talk about it, so she did not pursue it. As she said at the first trial, "I was shocked to hear he lived right be-side her and hadn't wanted to talk about it ... before." She added that this surprised her because she had always found Mr. Morin to be a very caring person.

On April 15, 1985, one week before Mr. Morin's arrest, she again raised with him the subject of Christine's death: "He just said, those things happen, what can you do. He said, 'The poor, sweet, innocent little girl.' things like that happen."

While there was nothing in the words that were unusual or inappropriate, it was the manner in which he expressed them that struck Ms. Patterson. She thought he had said this in a "very uncaring" way. She later testified that she expected more animation in his voice: his tone displayed no expression; it "didn't sound normal. I was surprised. I thought he would be a lot more concerned, him being her neighbour."

When Ms. Patterson expressed the hope that Christine had not been held captive before she was killed, Mr. Morin replied that Christine was murdered the night she was taken. He said, in response to a question, that her body was too badly decomposed to determine whether or not she had been sexually abused. He also told Ms. Patterson that she had been stabbed to death (the media reports shown to Ms. Patterson during the second trial demonstrated that the newspapers had reflected this.)

At the Inquiry, Ms. Patterson testified that when Guy Paul Morin told her that he lived next door to Christine Jessop, she called Angela Taylor, her girlfriend, over. She did not know if Ms. Taylor was listening to the conversation she was having with Mr. Morin. When the two left band practice that night:

> I think we may have said a few words ... to the fact of, that was really weird, or you know. We were eighteen years old at the time, so I'm sure it was probably something like that freaked us out, or something like that. But that's all I can remember.
>
> [W]e sort of looked at each other kind of went, jeez, you know, I wonder if Guy did this to Christine. And you know. I think we just sort of laughed it off and thought, you know, like it was just kind of silly.

Ms. Taylor was not called as a witness at Mr. Morin's second trial. Her will-say reflected that she thought it odd that Mr. Morin had not involved himself more intensively in the search for Christine Jessop. She also recalled Mr. Morin saying "things like that happen". She could not recall other things said in the ten to fifteen minute conversation.

Ms. Patterson testified at the inquiry that when she learned that Guy Paul had been arrested for the murder, her earlier conversation with him acquired more significance.

At the second trial Ms. Patterson testified that:

> ...[T]he conversation that I had with him that night was very significant to me. It stayed in my mind all week long and I thought about it almost every day.

On April 23, 1985, Ms. Patterson gave a statement to the police. She later said, before the Commission:

> I wasn't giving my statement to the police because I thought it was evidence. I was giving my statement to the police because my mother thought I should, just for my overall benefit of feeling a bit better. I know I had the conversation with him and if, for some reason, there was something in that conversation that would help the police, that's why I gave my statement.

Guy Paul Morin's Evidence

Mr. Morin testified that he met Ms. Patterson through band-playing. He had a friendly relationship with her and he recalled a conversation during which she suggested to him that, perhaps, Christine had been held captive somewhere:

> A. [S]he was speculating, saying things like maybe she was kept somewhere and I said from what I've heard it's possible that she was pretty well maybe, to have been found or taken shortly after, that night that she probably came home, or day, whenever she got back from school.
>
> Q. And from where did you get your thought that Christine Jessop was killed the day she was taken?
>
> A. Well, from what I read in the papers and heard on television and from Joe Loughlin, the first Durham officer I spoke to.

Mr. Morin only remembered speaking to Ms. Patterson once about Christine's disappearance and murder. He disagreed with her perception of his attitude as being uncaring.

Constable Loughlin testified that Mr. Morin asked him on January 3, 1985 about the cause of Christine's death. The officer said that he told Mr.

Morin that he did not know, but that her remains had been sent to the Centre for Forensic Sciences. He denied telling Mr. Morin that she died on the day she disappeared because he did not know this to be so. By the time of trial, the supplementary report that Constable Loughlin had made of their conversation had been lost. Newspaper articles were filed by the defence which included quotes such as "Police say she was abducted outside her house and likely was killed a short time later."

Use of the Evidence by the Crown

At the second trial of Mr. Morin, Ms. Patterson was the last witness for the Crown before it rested its case. In preparation for her evidence, she was provided with a copy of the transcript of her evidence from the first trial. She kept this transcript throughout the years and gave it to Commission counsel at the Inquiry. It was highlighted in some areas, while in others, portions of her testimony were crossed out. She said that this had been done by Crown counsel. For example, a portion of the transcript where she said "I asked him where he lived, like if he lived close to Christine Jessop, and he told me lived right beside her," was highlighted. The following testimony was bracketed and crossed out:

> I was shocked to hear he lived right beside her and hadn't wanted to talk about it to me before. ... I started to say whoever had done this to this little girl had to be a very sick person.

Immediately following this, there is another highlighted portion which reads as follows:

> He said, "Things like that happen, what can you do?". He said, "She was a sweet innocent little girl. Things like that happen".

Further vetting of Ms. Patterson's previous testimony was obvious, including wavy underlining of a passage wherein she said:

> I called the police and told them what he said to me. I was thinking about it all week.

Ms. Patterson testified at the Inquiry about the markings on the transcript:

> As far as I can recall, they crossed out the stuff that they didn't want me to say anymore. They said that it wasn't significant, and they highlighted the parts that they really wanted me to focus on.

Ms. Patterson presented to the Commission a document entitled "Questions for Mandy Patterson," consisting of 35 typed questions. Crown counsel had provided this to her in order to advise her of the questions they would ask while she was on the witness stand. On the bottom of the page, in Ms. Patterson's own handwriting, is this sentence:

> It was totally opposite compared to anything I had ever discussed with him. His tone was very uncaring. I was surprised.[30]

This is somewhat different than the testimony she provided during her first trial evidence, when she said:

> He sounded like he really didn't care. He really surprised me by the way he was talking and by the tone of his voice.

Beside this statement reflected in the transcript of Ms. Patterson's first trial evidence, was a handwritten question mark in the margin.

During the second trial, Ms. Patterson repeated almost verbatim what she had written down on the question sheet:

> It was completely opposite to anything that I'd ever discussed with him. His tone was very uncaring.

Ms. Patterson's evidence in examination-in-chief by Mr. McGuigan was, in part, as follows:

> Q. [C]ould you describe for the jury the manner in which he said those things; those things happened, poor sweet, innocent girl?

---

[30] During the Inquiry Ms. Patterson could not recall why she wrote the notation cited above, but she agreed that it may have been because it was the most significant part of the evidence she was to give.

> A. The way he said it was very uncaring.
>
> Q. When he was talking about that particular incident to you, how would you compare his tone of voice and his manner with the way that he discussed other matters with you?
>
> A. It was completely opposite to anything that I'd ever discussed with him. His tone was very uncaring.

And in cross-examination:

> Q. That was the only distinction, that was the only thing about his voice that you were talking about that didn't sound normal to you. You thought somebody should have more animation than you heard from Mr. Morin on that occasion, on that day when he happened to be speaking to you?
>
> A. His voice was very uncaring compared to the type of person that he was, that I knew him of. (sic) It was very on opposite to anything that I'd every discussed with him before. It startled me.

In cross-examination, Ms. Patterson was also directed to her evidence at the first trial in which she had agreed with defence counsel that one possible explanation for Ms. Patterson's perception was that Mr. Morin had simply talked about the incident enough over the months since Christine Jessop had disappeared. In re-examination on this point she said:

> Q. You seemed to want to say something else. Is there anything you want to say about that?
>
> A. I just wanted to say that I agreed because those questions that he did say to me were possibilities, they could be. They could be in any case, but I'm just saying, compared to the person that I knew, that I sat beside in band for two years or more, it was completely opposite.

The wording and order of the questions supplied to Ms. Patterson prior to her testimony were virtually identical, word-for-word, to the questions asked by Mr. McGuigan when he led her through her examination in-chief. Mr. McGuigan and Mr. Smith testified that this document was prepared to ensure compliance with rulings made by Mr. Justice Donnelly,

which had placed some limitations on the contents of her evidence. Mr. Smith said he was present when the list of questions was presented to Ms. Patterson. She was the only witness to receive such a list. Both Mr. McGuigan and Mr. Smith denied the allegation put to them by Mr. Morin's counsel that the notes written on the bottom of the list represented a script prepared by the Crown for Ms. Patterson to use. Mr. McGuigan also said that he did not know why some of her evidence was underlined or why there was a question mark beside the answer, referred to above.

Mr. McGuigan testified that Ms. Patterson's evidence was tendered to demonstrate that Mr. Morin had knowledge exclusively available to the killer — that Christine was killed the night she was taken. It also was significant because he talked about her death in an 'uncaring' manner. Mr. McGuigan testified that Ms. Patterson was intelligent, articulate, and seemed to have had substantial contact with Mr. Morin to support her observation which he invited the jury to consider as evidence of "unusual conduct or demeanor" on the part of Guy Paul Morin.

During the Inquiry, Mr. Smith acknowledged that the type of evidence that Mandy Patterson provided could be dangerous:

> I think with any notorious case, there's an unfortunate phenomenon where people pick sides, and the side they pick has a real ability to influence the colour, if I can put that way, of their evidence. And more than that, I suspect that in some rare cases, the side they pick chooses (sic.) them to consciously or unconsciously fabricate evidence.

Ms. Patterson was approached by the defence prior to giving evidence at the second trial. She was at home on a Sunday evening when someone, representing the defence, arrived unannounced. She testified that the Crown had told her that she did not have to talk with the defence if she did not want to. She decided not to speak with them because "they were labeled the bad guys." She said that this labelling probably came from herself as a result of being previously cross-examined on the stand. This is what she told the Inquiry:

> I had never been in a court room and I think I was young and I think they [people associated with the Crown side of the trial] wanted to prepare me to tell me that, you know, the defence were going to take my

> testimony or my statement at that time and to try to twist things around to make it look like I was lying. And I guess that just left a bad reflection in my mind of the defence.

Ms. Patterson told the Inquiry that she felt she was part of the prosecution team:

> The Crown wanted to make sure that he was found guilty and it was sort of like a – like the atmosphere of being around the Crown was "we're going to get him" kind of thing.

Ms. Patterson also said that she regretted the role that she played in the conviction of Mr. Morin. Mr. Morin's counsel challenged her on the level of her regret, considering her 'tone of voice;' Mr. McGuigan's counsel objected to questions based on the tone of her voice. With respect, this was somewhat ironic considering that Ms. Patterson's evidence was called, in part, to discuss Mr. Morin's tone of voice during their conversations.

Mr. Smith described Ms. Patterson as a thoughtful witness and said that he would be surprised if she had fabricated her evidence because of the notoriety of this case. He reflected that many of the items used as evidence of consciousness of guilt were highly questionable and he queried whether such an inference could be drawn from the Mandy Patterson evidence.

This theme was raised with Ms. Patterson and Mr. McGuigan at the Inquiry. The following is an excerpt from Ms. Patterson's examination by Commission counsel:

> Q. "Things like that happen, what can you do? She was a sweet, innocent little girl." It was the tone that struck you rather than the contents, as I understand your evidence; is that right?
>
> A. Right. Yeah, he just -- no expression.
>
> Q. Okay. So that there was nothing in the words that were unusual or inappropriate, it was the manner in which he expressed them that struck you at the time; do I have that right?
>
> A. Right.

Q. And I guess I want to ask you this, had you ever seen him grieve the loss of a friend or relative?

A. No.

Q. Or seen him celebrate the birth of a family member or a family occasion of any sort?

A. No.

Q. Or seen him celebrate the birth of a family member or a family occasion of any sort?

A. No.

Q. Or had you ever seen him angry, that you can recall?

A. Not that I can recall.

Q. Had you ever seen him really, really upset?

A. No.

Q. No. And you hadn't been to his home, you've said, and he hadn't been to your home; am I right?

A. Right.

Q. And I guess what I want to ask you is, with the benefit of some reflection and hindsight, and so on, that really, you'd had very little, if any, exposure to the range or lack of range of emotions that Guy Paul Morin showed in those kinds of situations; am I right?

A. Right. The only emotions that I really had that he had showed to me was just the relationship that we had, basically.

Q. So that how he expresses his losses or how he expresses anger or how he expresses grief or bitterness, you didn't know anything about those aspects of his personality, I take it?

A. No.

Q. Is that fair?

A. Mm-hmm.

Q. And as I understood the answer that you gave to Mr. Scott at the first trial and to Mr. McGuigan at the second trial, what struck you here was that his tone was basically the tone that you would have in every day conversation, there was nothing other than an every day tone that he used when he spoke those words; am I right?

A. Right.

Q. Did you know when you spoke to him in April of 1985 how many times he had or hadn't discussed with neighbours, or friends, the Christine Jessop death between January and April of 1985, or her disappearance between October '84 and April of 1985? Did you have any idea about how many times he had had to or chosen to discuss this matter before he spoke to you about it?

A. No.

At the Inquiry, Mr. McGuigan was asked:

Q. [Do you see] any of the following dangers in this kind of evidence. The first, that evidence of someone's emotion, or demeanour, or uncaring attitude, is being given by witnesses who have no exposure, or little or no exposure to Guy Paul Morin's range of emotions.

No knowledge of his emotional range, how he does or doesn't express emotion. Do you see that as a danger that a witness can look at someone's so-called uncaring look, and misconstrue it based on little or no knowledge of how that person does or doesn't express emotion?

A. Well, based on your hypothetical set of facts that you relate, I'd agree with that. But I don't think Many Patterson is someone who didn't know his emotion. She had spent some considerable time with him, talked to him and had shared a music stand with him.

Q. [W]ould you agree with me that there could be a danger in exposing a jury to this kind of evidence absent some foundation that the witness, indeed, has an

> appreciation of the range of emotions to be expressed by the accused?
>
> A. Yes.

The above excerpt of Ms. Patterson's evidence was read to Mr. McGuigan. He was asked:

> Q. Was your understanding of her position that, that she communicated to the Inquiry in those questions and answers? Is it any different than that which you understood back then?
>
> A. I haven't read her evidence for some period of time, but I thought one of the things she tried to demonstrate in the first trial was a tone to Mr. Ruby that would indicate how different he had spoken these words to how he normally spoke.
>
> .....
>
> Q. Had she said those things to you in an interview that she said to me at the Inquiry, do you think that her evidence on that point would have had any probative value in establishing guilt or innocence?
>
> A. Well, I'm not so sure that it had a great effect in any event because she was cross-examined on this, I think a fairly excellent cross-examination.
>
> .....
>
> [A]lthough it's not necessarily part of the narrative, it's part of the whole scenario. And it just seems to me that every day we make, as human beings, we make these kinds of decisions when we've dealt with people and say they're different today, they must be down, what the hell happened to him, or, you know, that sort of consideration. And we, as human beings, I think become sort of experts on that.

The Trial Judge's Ruling

Mr. Justice Donnelly, in a pre-trial ruling on the admissibility of Mandy Patterson's evidence, held as follows:

> The murder of Christine Jessop was heinous. The body had recently been discovered. Mr. Morin's immediate neighbour was the victim. As a fellow band member, Mrs. Patterson was familiar with Guy Paul Morin's normal behaviour and thereby was able to form an opinion and arrive at a conclusion about his demeanor. Her observations of his insensitive and uncharacteristic response were scaled against her familiarity with Mr. Morin and not against her expectation of a universal standard of response. Guy Paul Morin's emotional reaction draws its relevance as a departure from his usual norm.
>
> Mr. Morin's emotional response can only be judged against the context in which it occurred. For the purpose of conveying meaning, words, conduct and demeanour are inseparable. The relationship between words and demeanour is well recognized as a fundamental consideration in assessment of evidence by triers of fact. That Mr. Morin's emotional condition may be taken in conjunction with the words spoken at the time is supported by the former 'recent complaint' line of sexual assault cases where the emotional condition of the victim was capable of being corroborative on the issue of consent.
>
> .....
>
> The central issue in the Guy Paul Morin retrial will be the identity of the killer. This demeanour evidence as observed by Mandy Patterson is tendered on that issue. The evidence draws relevance as the words and conduct of the accused relative to the specific crime with which he was charged one week later. The accused's uncharacteristic verbal response and accompanying demeanour are capable of connecting the accused to the crime by supporting a logical inference of consciousness of guilt based upon the premise that inner consciousness of guilt leaves a psychological mark. That evidence may logically be accepted by the jury as probative of a fact in issue - the identity of the killer. Mr. Morin's conversation with Mandy Patterson and his emotional state are not evidence of bad character which might support an inference that the accused had a general disposition rendering it probable that he was the type of person who would commit this crime.

> Ms. Patterson's reference to her "shock" that Guy Paul Morin hadn't wanted to talk to her about the occurrence and her view about the "sickness" of the killer are not probative of any fact in issue. Her 'shocked' reaction and her view about 'sickness' have no relevance and will not be admitted into evidence.
>
> Otherwise the evidence of Mandy Patterson is probative as relating to the issue of consciousness of guilt. It is thereby relevant and not subject to any exclusionary rule. The evidence is not subject to exclusion under the original or reinterpreted rule in *R.* v. *Wray* regarding considerations of balancing probative value of evidence, as it relates to consciousness of guilt, against the prejudicial effect relative to the disposition and propensity of the accused. Guy Paul Morin's conversation with Mandy Patterson and her observations of his demeanour will be admitted into evidence.

Findings

Ms. Patterson advised the police of conversations which she allegedly had with Guy Paul Morin, as a fellow band member. Her evidence was tendered by the prosecution at both the first and second trials. At the second trial, Donnelly J. excluded part of her evidence and was correct in doing so. The prosecutors provided Ms. Patterson with a transcript of her first trial testimony, crossing out those portions which were now inadmissible. I accept the evidence that those excisions were done to ensure compliance with Donnelly J.'s order.

Ms. Patterson was also provided with a list of each question that she would be asked at the second trial. These questions were virtually identical to the questions that were asked of her by Mr. McGuigan at trial. During her testimony at the Inquiry, counsel for Mr. Morin suggested that this constituted a "script." Mr. McGuigan later responded by noting that no other witness was provided with a list of questions and that this approach was again reflective of the need to carefully ensure compliance with the trial judge's order. Again, I am prepared to accept this explanation.

However, there was an aspect of the interviewing process that concerned me. A portion of her previous testimony was underlined. This portion reflected that she had been thinking about her conversation with Guy

Paul Morin all week. Another portion had a question mark beside it. Then, at the bottom of a second document (the typed list of "questions for Mandy Patterson) in Ms. Patterson's writing is a slightly more assertive version of the same evidence. This more assertive version of the same evidence was extremely similar to the ultimate evidence which she gave in examination in chief, cross-examination and during re-examination. Ms. Patterson indicated that, to the best of her recollection, the prosecutors crossed out the "stuff" they did not want her to say anymore and " highlighted the parts that they really wanted me to focus on." Mr. McGuigan had no specific recollection of how Ms. Patterson came to reflect her handwritten answer on the bottom of that page or how or when the other markings were placed on the copy of the transcript of her evidence at the first trial.

Witnesses must, of course, be prepared, and all good counsel will do so. It is obvious to me that the preparation by both sides in this case was extraordinary. But it is wrong to suggest that certain things should be said, while others should not. I am uneasy with the highlighted portion of the transcript she was given, and also with the final sentence, written in her own hand and repeated almost verbatim in her testimony. Though I do not find that Mr. McGuigan told Ms. Patterson what to say, I am concerned that the interviewing process may have overly contributed to the final version of her evidence. I am mindful of Mr. Lockyer's concession in this regard.

Ms. Patterson suggested that her conversation with Guy Paul Morin had concerned her even prior to his arrest. This may or may not have been so. I am convinced that Guy Paul Morin's arrest did colour or solidify her perceptions about the conversation(s) she had with him. Ms. Taylor may have been present for part of the conversation; she was not called as a witness at the trial.

Ms. Patterson reflected the mind-set of various Crown witnesses: she felt like 'part of the prosecution team'; she was enveloped to some extent by the confidence and determination of the authorities, and she labelled the defence as 'the bad guys.' She said that she was told that she did not have to speak to the defence and that the defence would try to make her out to be a liar. Ms. Patterson's evidence at the Commission was that she felt stronger at the second trial than at the first; she had had the experience of testifying already, she was older, and she walked in "with the kind of an attitude where I was going to give my testimony and I was going to tell them what was said to me and I wasn't about to let anybody try to push me around over it."

Interestingly, her perception as to how defence counsel had treated her at the first trial was, itself, coloured; the first trial transcript reveals that Mr. Ruby asked her only a few questions and, rather than attack her, simply sought to demonstrate, in a non-confrontational way, the limited inferences that could be drawn from her evidence.

Ms. Patterson did not intentionally mislead the Court or this Inquiry. But she did take sides and it did colour her approach to the evidence. Crown counsel must be extremely careful not to encourage this adversarialism on the part of their witnesses, even though it might make the witness more favourable. Further, though Crown counsel is entitled to advise the witness that he or she has no obligation to speak to the defence, the message should not be communicated in a way that, again, invites the witness to take sides and effectively makes it unlikely that the witness will speak to the defence.

The real problem with much of Ms. Patterson's evidence is that it should have formed no part of the trial. Her feelings or perceptions that Guy Paul Morin should have sounded more concerned or caring when speaking about Christine Jessop was evidence that contributed little more than prejudice and constituted the most dangerous kind of evidence. Its use at this trial as yet more evidence 'consistent with Guy Paul Morin's guilt' — indeed, from the last witness for the Crown — was inappropriate. In that regard, the Crown cannot be faulted; it sought and obtain a ruling favouring its admission as evidence.

Ms. Patterson's evidence that Morin said that Christine Jessop was killed the same night was also of dubious value. We do not have any proof that what he did say could only be known to the killer, yet that was precisely the inference the jury was invited to draw. Many people thought she was killed the same night. This was equally explainable as speculation. (The credibility issue between Officer Loughlin and Guy Paul Morin complicates an assessment of the admissibility of this evidence.) It is unnecessary to determine its ultimate admissibility for the purposes of this Inquiry.

Failure to Search

One of the elements of consciousness of guilt that was put forward to the jury by the Crown attorneys was Mr. Morin's failure to join the search for Christine Jessop, his failure to attend her funeral and his failure to express his condolences to the family. While Mr. McGuigan acknowledged that he had

never led this kind of evidence before, he stated that he never considered such evidence to be "ground-breaking."

In explaining the probative value of Mr. Morin's failure to participate in the searches for Christine Jessop, Mr. McGuigan stated that the evidence was indicative of consciousness of guilt because Mr. Morin was her next-door neighbour, who liked Christine and had not participated in the tremendous community search effort. In addition, although he had been asked by the Jessops one day to participate in a search, he declined, indicating that he had to work that day. The evidence indicated that he did not work that day.

Ms. MacLean also considered it odd that a next-door neighbour would not have searched, given that community of Queensville was searching and busloads of individuals were coming from Toronto to assist in the endeavour.

Mr. McGuigan was queried during the Inquiry as to whether he would have attempted to lead evidence that, had Mr. Morin *participated* in the search, this behaviour was *indicative* of guilt. He stated that he would not have done so as engaging in the search would have been the rational and reasonable thing to do. He acknowledged, however, that he could see how an accused person in such a situation could be in a "Catch-22" position.

Failure to Attend Funeral and Funeral Home

Mr. Morin's failure to attend Christine Jessop's funeral was also adduced as evidence of consciousness of guilt. It was suggested, however, by counsel for Mr. Morin, that his attendance at the funeral might equally have been adduced as *indicative* of his guilt on the theory that, in investigating an murder, the police attempt to identify those attending the victim's funeral, thinking that the killer might attend. In fact, in the Jessop homicide, considerable investigative efforts were expended by the police at the funeral in this regard.

While Mr. McGuigan did not recall these efforts, he stated that his understanding was that in such cases police are looking for strangers, not acquaintances of the victim who would have every reason to attend the funeral. Mr. McGuigan did not consider the evidence of Mr. Morin's failure to attend Christine's funeral as overreaching, nor did he see this as raising the same "Catch-22" issue as with the failure to search.

During this trial testimony, in cross-examination, Mr. Morin testified that he did not attend Christine Jessop's funeral because he had not received an invitation.

Mr. Smith testified before the Commission that he would not now call such evidence. He stated that his view of consciousness of guilt evidence is affected by developments in the law, events at the Commission, and a reflection on the fact that they obviously drew the wrong inferences from the evidence. Mr. Smith stated that if an innocent explanation exists for the consciousness of guilt evidence, it should not be called. There was an innocent explanation for Mr. Morin's failure to attend; he could have been socially shy.

Failure to Express Condolences

Similarly, Mr. Morin's failure to offer condolences to the family was viewed by the Crown attorneys as relevant to his guilt. In Mr. McGuigan's opinion, it was not a valid explanation to say that Mr. Morin did not express his condolences because of his age and social awkwardness in dealing with the grief of his next-door neighbours. Mr. Morin testified during the second trial that he did not go over to the Jessop home with his mother and father when they offered their condolences as he "thought that was more of a parent sort of thing to do."

Findings

It is undoubtedly clear at this point that, with due respect to the trial judge, I am of the view that much of the 'consciousness of guilt' evidence not only should not have been left with the jury on that basis, but should not have been admitted at all. In my view, the failure to search for Christine Jessop was worthless evidence and ought to have been excluded. The situation was compounded in that Morin's answer as to why he did not search on one day was shown to be wrong, and his explanation was left to the jury as further evidence of his consciousness of guilt. Ironically, Douglas' profile suggested that the killer might be overly cooperative, and assist in the search to divert attention from himself. This points up the worthlessness of this evidence.

Mr. Morin's failure to express condolences also was worthless evidence and ought not to have been admitted. Indeed, Mr. McGuigan invited

the jury to note that Morin had not expressed his condolences up to the present date. Apart from the overall inadmissibility of this evidence, it was surely incorrect to invite the jury to infer anything from Morin's failure to express condolences, once he was charged with Christine Jessop's murder. Mr. McGuigan conceded, on reflection, that this is so. (He had not intended to include the time-frame after arrest.)

Mr. Morin's failure to attend the funeral or funeral home was worthless evidence and ought not be have been admitted. Again, the situation was compounded in that Morin's answer (that he was not invited) was, not surprisingly, used to reflect upon his credibility. The issue should never have been before the jury in the first place.

As I have earlier reflected, the introduction of all of this evidence, together with other problematic evidence of consciousness of guilt, was bound to have had, in its accumulation, a significant effect on the jury. The leading of this evidence demonstrated that the prosecution, led by Mr. McGuigan, sought to squeeze every drop out of the information available to them, to support their case. However, there was no impropriety in the leading of this evidence, since it was presented to the trial judge who ruled on it. Further, in fairness to both the trial judge and Crown counsel, there has been some greater sensitivity to the limited use of consciousness of guilt evidence expressed by appellate courts more recently than was the case during the currency of the trial. My later recommendations further address the use of 'consciousness of guilt' and related evidence.

E. The Alibi

(i) Overview

At both trials, Mr. Morin testified that he did not murder Christine Jessop and told the jury of his whereabouts on October 3, 1984. The defence led evidence as to the time Mr. Morin left work on that day, his subsequent shopping activities and his arrival time home. Alphonse and Ida Morin supported their son's evidence that he came home with groceries, took a nap and worked on renovations to the family home after dinner.

It was Crown counsel's position at the Inquiry that Mr. Morin's

conviction at the second trial resulted, at least in part, from the failure of the defence to establish a credible alibi. On the other hand, the position of counsel for Mr. Morin at the Inquiry was that the prosecution converted exculpatory evidence and innocent conversations into incriminating evidence as the result of their tunnel vision or their desire to secure a conviction.

The timing and minute detail of the activities of Guy Paul Morin and his family on October 3, 1984, were the subject of considerable analysis and evidence and it is summarized below.

(ii) Mr. Morin's Statements to Investigators

When Guy Paul Morin was first interviewed by Detective Fitzpatrick and Inspector Shephard on February 22, 1985. He initially estimated that he returned home from work on October 3, 1984, at approximately 4:30 p.m.:

> Morin: That particular day I was starting in the morning about 7:00 and finished at I think was, ah, 3:30, then went shopping, got home around 4:30. It only takes me about 45 minutes to get home from where I work.
>
> Fitzpatrick: Okay, so you had, you got home around 4:30.
>
> Morin: All of it. It's easily 4:30, it had to be.
>
> Fitzpatrick: Ya.
>
> Morin: 'Cause, ah, normally I would have seen it ... So if I was there that day I guarantee you I could even tell you the licence plate, everything. 'Cause I'm really suspicious of anyone who stops in front here or anything like that. So that's why I'm really pissed off at myself for not being there. Shopping screwed me up that time. Usually from work I would pick up the odd thing at the mall.

Later, in the untaped portion of the interview, he adjusted his arrival time home to between 4:30 and 5:00 p.m.

Indeed, there were a number of timing errors that he made to the

police in this statement relating to the occurrences some five months before. After telling the investigators that he worked at IIL International for "no more than three months," he later realised, "Oh gosh, when you really think about it, I worked there about a year and a half instead of three months." In this context, he added "I'm really bad with times." While he told the detectives that he had started work that day at 7:00 a.m. (a time he later, in the untaped portion of the interview, changed to between 7:20 to 7:30 a.m.), a check of his workplace time card records revealed that he had not arrived at the plant until 7:56 a.m. Mr. Morin indicated that he thought Christine Jessop disappeared "in the late summer, wasn't it?" Leo McGuigan could not recall his view of this comment at the time, but offered two possible explanations which would have then been open for consideration: either Mr. Morin was not being frank about his recollection of the season, or he had mentally repressed this information. He thought a next-door neighbour would have remembered the date of the kidnaping and the events associated with it.

Mr. Morin said, at his first trial, that during his conversation with the police, he did his best to figure out his timing, months after the event. When asked in cross-examination at the second trial why he told the police he got home at 4:30 p.m. if he went shopping, he said that he "blended the two together without really taking into consideration my one hour of shopping." When asked why he adjusted the time of his arrival home from 4:30 p.m. to between 4:30 and 5:00, he replied that he had estimated that if he got out of work at 3:15, he would have been home at 4:00; with one hour of shopping he would have been home at 5:00. In fact, Mr. Morin's time card documented that he did not leave his place of employment until 3:32. A police timing run confirmed the drive from Mr. Morin's workplace to his residence to be 42 minutes.

Upon his arrest on April 22, 1985 — almost seven months after Christine's disappearance — Mr. Morin had this conversation with the detectives relating to his arrival home:

> Morin: I got home at maybe 5:00 - 5:30 for sure.
>
> Shephard: You told us 4:30, Guy.
>
> Morin: Gosh 4:30 look it takes me an hour easily. I'm sure I'm quite sure, I know I had easily good (sic) groceries (sic.) bags it takes time to shop and my time

> was immediately out of touch with Christine Jessop's.
>
> Shephard: You told us you were home at 4:30, you told us that 3 or 4 times.
>
> Morin: You think I was home around 4:30, okay let's say I was, if that's what I told you I mean time usually I would get home around 4:30 but that day I told you I even went shopping. I remember coming in with all the grocery bags. [Frank] Devine was there too, I do remember that for sure but even if I was home at 4:30 I have no idea, I never saw her that day.

During the Inquiry, Crown attorney Susan MacLean acknowledged that while the range of times that Mr. Morin provided and his admitted inability to specifically remember times could indicate that he was doing his best to provide estimates, her perception of his various statements was that he was constructing an alibi.

It was suggested to Mr. McGuigan that had Mr. Morin murdered Christine Jessop, he would have known the time of the abduction; if he intended to avoid admitting any opportunity to abduct her, he would have placed his arrival at home as late as possible. Mr. McGuigan noted that in light of the psychiatric evidence (discussed later in this Report), Mr. Morin might have been in a state of psychosis and may not have remembered the exact time of the abduction.[31]

(iii) The Alibi Notices

Following the arrest of Mr. Morin, Bruce Affleck, Q.C., and Alexander Sosna were retained to represent him.

On June 28, 1985, Mr. Affleck provided 'alibi information' to John Scott relating to Mr. Morin's activities on October 3, 1984:

> On the morning of October 3rd, 1984, Guy had breakfast and drove to work at I.I.L. which is situated

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[31] Indeed, Dr. Turrall's evidence at the first trial was that one of the symptoms of the illness is distortion of time; in his opinion while Mr. Morin would know whether it was morning or night, he may have more difficulty if asked to be more specific.

> between Steeles and Finch near Highway 401. He punched out of work at 3:32 p.m. and proceeded along Highway 401 to Highway 9 and into Newmarket where he entered the Upper Canada Mall. He purchased a 649 Lottery ticket as well as a Lottario ticket at a kiosk inside the mall. He proceeded from there to the Dominion store and from there to Loblaws. He left Loblaws at approximately 5:10 p.m. and proceeded along Highway 11 towards Bradford and from there on to Bathurst Street and turned left onto the Queensville Sideroad where he proceeded east to Queensville.
>
> He arrived home at approximately 5:30 p.m. When he arrived home the following persons were present: his fater (sic.) Alphonse Morin, his mother, Ida, his sister Yvette and her husband, Frank Devine.

On July 10, 1985, Mr. Scott wrote to Mr. Affleck asking for the identity of any person who saw Mr. Morin between 3:32 and 5:30 p.m. that day. He also notified Mr. Affleck that police officers would wish to interview the Morin family concerning the alibi.

On August 15, 1985, Mr. Sosna provided Mr. Scott with further alibi information:

> The following is a synopsis of the alibi evidence which will be tendered on behalf of the Defence. Four witnesses will be called to substantiate the whereabouts of our client on October 3, 1984. The following people will give evidence confirming that Guy Paul Morin returned home at approximately 5:30 p.m. These people are as follows:
>
> 1. Al Morin, our client's father.
> 2. Ida Morin, our client's mother.
> 3. Yvette Morin, our client sister.
> 4. Frank Arthur Devine, the brother-in-law of our client.
>
> Yvette Morin would indicate that she arrived at her parents' home at approximately 3:30 p.m. in Queensville. She attended to discuss the health of her young son who was hospitalized. At approximately 4:00 p.m., Frank Devine attended at the Morin home in Queensville. He remained at that residence until

> approximately 5:30 p.m. At that time, when exiting, he met Guy Paul Morin who was about to enter the home carrying some groceries. A brief discussion ensued between the parties and Mr. Devine left the Morin residence. Al Morin would indicate that he was home the entire day and would confirm the attendance of both his daughter, Yvette, and Frank Devine at the approximate times already outlined. He will also indicate that his son, Guy Paul Morin, arrived home at approximately 5:30 p.m. carrying groceries that he purchased. Our client stayed at home for the entire evening, without leaving.
>
> Ida Morin would corroborate the evidence of her husband and confirm the attendance of both Yvette Morin and Frank Devine at her home.
>
> It is my understanding that these witnesses have already been interviewed by the police authorities and, therefore, their addresses are available to you for the purposes of further investigation. Should that not be the case, please contact me and I will supply you with the addresses of the people outlined above.

(iv) The Devines

At Mr. Morin's second trial, his alibi was challenged, *inter alia*, on the ground that members of the Morin family had originally tied their recollections about his time of arrival home to the hospitalization of Andrew Devine, the infant son of Mr. Morin's sister, Yvette, and her husband, Frank Devine.

There is no mention of Andrew Devine in Mr. Morin's statements to the police, or in a conversation Mr. Morin had with Mr. May on July 1, 1985, as to his whereabouts on October 3, 1984. (This conversation is discussed below.) The first time Andrew's hospitalization and the alibi were formally linked is in Bruce Affleck's August 15th letter, set out above. A review of this letter, however, indicates that it is unclear whether Ida and Alphonse Morin actually adopted the statement of Yvette Devine and tied their recollection of Guy Paul's arrival home to the hospitalization of their grandchild — an event, Ms. MacLean thought, would not be easily forgotten by family members. John Scott agreed that the letter contained no indication that Alphonse and

Ida Morin linked their recollections to the hospitalization of Andrew Devine.

Frank Devine, Guy Paul Morin's brother-in-law, was of interest to the investigation for two reasons. First, he had supported Mr. Morin's alibi as to his whereabouts the afternoon Christine Jessop disappeared. Second, Paddy Hester alleged that she had seen Mr. Devine driving with Guy Paul Morin and his father late in the evening on October 3, 1984. (This is discussed in detail elsewhere in the Report.) The investigative practices reflected in the interviews of Mr. Devine are also of interest.

On March 1, 1985 (approximately a week after Guy Paul Morin's first interview with Detective Fitzpatrick and Inspector Shephard), Yvette and Frank Devine were interviewed by these officers regarding their October 3, 1984 activities. The Devines described visiting the Morin household that afternoon. Yvette thought she recalled leaving the residence to visit their son Andrew, who was hospitalized at the time; however, during this interview both were uncertain, due to the elapsed time, as to the times of their arrival and departure and whether Andrew was actually in the hospital on that date. Ms. Devine advised the police that Andrew,

> had just been put in the hospital ... that day or the day before. I'd gone over to let them know how he was doing ... I know we left before 7:00, anyway the two of us were definitely there cause I went back to the hospital that night.

In the course of the interview, she said that her memory of October 3, 1984 (whether it was a Tuesday or a Wednesday) was "pretty bad." After Frank joined the interview, Yvette asked him "Andrew was in the hospital at that time wasn't he?" and Frank replied "I think so. That was a long time ago." Inspector Shephard then asked "Do you remember if Guy had anything with him when he came in?" Frank turned to Yvette and repeated the question, and she responded "I think he had groceries or something."

It is worth noting, at this point, that Andrew was treated by the family physician on October 2nd and October 4th and was admitted to hospital on the 4th.

Yvette and Frank Devine recalled Frank arriving at the residence at times ranging from 3:15 to 4:15 p.m. and departing at times ranging from

5:30 to 7:00 p.m. Ms. Devine recalled leaving the residence after Frank, sometime before 7:00 p.m., possibly at 6:00 p.m.[32] When Mr. Scott received the alibi letter, discussed above, he knew that Frank and Yvette Devine had been questioned by Detective Fitzpatrick and Inspector Shephard on March 1, 1985.

Frank Devine was interviewed again on March 14, 1985. Inspector Shephard's notebook entry reflects that his tape recorder malfunctioned during this interview. A supplementary report filed by Detective Fitzpatrick states that Mr. Devine was

> questioned again [as] to what time Guy Paul had arrived home, what time he, Frank, left and where he went. Devine related the same information as he had on the previous occasion when he was interviewed at his residence with wife Yvette.

During this interview, Mr. Devine signed a consent to release his son's hospital records.

On March 15, 1985, the investigators examined these records. As pointed out before, they discovered that Andrew was not admitted to hospital until October 4th. Detective Fitzpatrick described how he felt at the time:

> When you're [in] an investigation like that, and you run across these things ... you start thinking of cover-up, something wrong here. And you start looking into it a little further.

Although he and his partner originally thought that the Devines were mistaken, by the time of the first trial, Shephard and Fitzpatrick had come to the view that they were concocting an alibi for Guy Paul Morin.

On September 19, 1985, Mr. Morin discharged Mr. Affleck as his counsel and retained the services of Clayton Ruby. On December 9, 1985, Detective Fitzpatrick and Inspector Shephard attended Mr. Ruby's office for

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[32] At points during the interview Ms. Devine variously stated that Guy Paul arrived home between 4:30 to 5:00 p.m. with a lot of groceries, that he arrived when Frank arrived, or that he may have arrived as they were leaving.

a meeting with the alibi witnesses, Frank and Yvette Devine and Ida and Alphonse Morin. During this meeting, Mr. Devine maintained the connection between seeing Guy Paul that afternoon and his son's admission to hospital, despite the fact that the records reflected that Andrew was not admitted until the following day. Mr. Devine thought that these records were in error.

Inspector Shephard told the Inquiry that Mr. Morin's counsel suggested that the interview of the three alibi witnesses be a joint interview. Inspector Shephard responded that the interviews must be conducted individually in order to preserve the integrity of the process. Accordingly, the supplementary report of the interview reflects that the witnesses were interviewed separately; Frank Devine's interview commenced at 7:30 p.m., Ida Morin's at 10:02, and Alphonse Morin's at 10:14 p.m.

Detective Fitzpatrick said that of all the alibi witnesses put forward by the defence, he viewed Frank Devine as the weak link. By the time preparation began for Mr. Morin's second trial, Frank and Yvette were experiencing marital difficulties. Fitzpatrick was asked about this during the Commission hearings:

> Q. [Y]ou and [Shephard] thought you might be able to take advantage of the family split up between [Frank] and Yvette, correct?
>
> A. Possibly, yes.
>
> Q. And indeed, what you understood to be something of a custodial or access dispute about their child?
>
> A. I'm not sure, I can't seem to recall everything on it, but I'm sure we were thinking along that line.

Following Mr. Morin's acquittal at his first trial, and in preparation for a re-trial, Mr. Devine was re-interviewed on November 2, 1987, in Inspector Shephard's vehicle. A transcript of the tape-recorded interview contains the following introductory comments:

> Shephard: [A]re you going to talk to Mr. Stone [Devine's family lawyer] or Ruby?
>
> Devine: No, I'm going - I'll talk to Stone, yeah.

> Shephard: Because I'm sure, I'm sure that if you talk to Ruby, he's going to say don't talk to the police.
>
> Devine: Um hm.
>
> Shephard: Don't talk to anybody, because he may not use you as a witness himself, and he may not, ... and obviously doesn't want anyone else to use you, but the thing is that um if the Crown subpoena's you, you're not gonna have any choice in the matter, ... whether Mr. Ruby says don't talk to the police or not, if he subpoenas you, ... you're going to be there, and that's all there is to it, or they'll issue a warrant for you, and you know, one way or another.

It was in the course of this interview that Inspector Shephard told Frank Devine of his belief that Guy Paul had murdered Christine Jessop:

> Shephard: See Frank all we're trying to do is get to the bottom of this thing. There's no doubt in our minds that Guy Paul committed this horrendous crime. Absolutely no doubt in our mind. There's no doubt in the Crown Attorney's mind, and ah you know, I could go on and on and on, and it's a travesty to think that ... this guy is going to get away with murdering and sexually assaulting this little girl. It's just you know, there's absolutely no doubt in our minds at all.
>
> Devine: Um hm.
>
> Shephard: And if you can shed the least little bit of light on it, you're not only going to do the justice system a favour, you're also doing Guy Paul a favour because he's one sick sick boy. I don't know whether you realize that or not. You weren't at the trial when all the ... psychiatric evidence was brought out about him.
>
> Devine: Um hm.
>
> Shephard: He is one sick little boy. And um the only way he's ever going to get any help is, is through a mental institution. And if they don't get him there before long the same thing's going to happen again and it's going to be somebody else's little girl ... that's going to wind up in the same perdicament (sic.) as Christine Jessop did.

.....

> Because it won't end here. I can guarantee you that. And all the people we've dealt with ... we've brought up professionals from the United States and there's professionals here in Canada dealing with the psychiatric assessments and reports, and ah they all say the same thing: It'll happen again.'

Later in the interview, Inspector Shephard spoke about Alphonse Morin:

> I understand that ah at one point he [Morin] may have ah wanted to plead guilty and his father wouldn't let him. ... But that's neither here nor there, and his father stood behind him and I give him credit for that.

Detective Fitzpatrick and Inspector Shephard said that they received information from 'a source' that Mr. Morin wanted to plead not guilty by reason of insanity. To their minds, this was indistinguishable from a plea of guilty. They could not, however, recall this 'source.'[33]

Inspector Shephard also conveyed to Mr. Devine his views about Mr. Morin's acquittal at the first trial:

> Devine: You know with ... what I heard in the news and stuff like that, and ah I couldn't believe it. What he was doing [referring to Morin's alleged conversations in jail], I mean unless he must have felt that he done it or something, you know.
>
> Shephard: Well I don't think there's any ... doubt at all. At least not in my mind anyway, Frank.
>
> Devine: Um hm.
>
> Shephard: If there was, ... I wouldn't pursue the matter. If there was the least bit of doubt in my mind that he didn't do it, I'd be, looking at somebody else. But you

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[33] It would appear this information was provided by Ms. Hester to Detective Fitzpatrick in a February 1987 interview, discussed elsewhere in this Report.

> know, the evidence is there and when you talk to anybody in any legal circles, they'll tell you it's just a goddamn fluke that he wasn't convicted or found not guilty by reason of insanity. And actually, I think everybody was hoping, including Ruby, in fairness to Ruby too, I think he was hoping that ... if it was a case of one or the other, it would be not guilty by reasons of insanity. But when you're dealing with a jury you just, you just never know. There was alot (sic.) of technical evidence there too, that maybe the layman didn't understand and obviously the judge didn't put it to them properly, or the Ontario Court of Appeal would never have said: hey, you're getting a new trial. You know, they'd have said he did the job right, and it was presented to them properly and that's the end of it, he's not guilty. But we've got three judges down there that reviewed it and they said the trial judge didn't put the case to the jury properly, ... so now we're into the new situation.

During this interview, Mr. Devine did not waiver from his recollection that he saw Guy Paul arrive home on October 3, 1984 because that was the day his son went to the hospital. Nor did he alter his position when he was, again, interviewed in 1989.

Despite his remarks, Inspector Shephard maintained that he kept an open mind in the course of the re-investigation of Mr. Morin for the murder of Christine Jessop. He justified his comments to Mr. Devine as an attempt to elicit truthful information about the alibi. He told the Inquiry that he was convinced that Mr. Devine was not merely mistaken about the date of his son's admission to hospital, but that he was, in fact, lying in an attempt to assist Mr. Morin in establishing an alibi. He was unconcerned that his own expressions of Mr. Morin's undeniable guilt might affect the reliability of the witness.

In hindsight, however, Inspector Shephard recognized how interviews conducted in this manner might taint the evidence of potential witnesses. He could not recall whether he expressed similar views about Mr. Morin's guilt and the evidence relating to his mental state to others. But he acknowledged that he may have told witnesses that the case against Guy Paul Morin was very, very strong.

On March 1, 1989, Mr. Devine was interviewed again by Detectives Fitzpatrick and Inspector Shephard. By this time he was separated from his wife. The purpose of the interview was to obtain any information that Mr. Devine had previously held back, but Detective Fitzpatrick denied that the interview reflected an attempt to destroy Mr. Morin's alibi. Again, Mr. Devine did not waiver from his earlier statements.

The tape-recorded interview commenced with the following discussion about Mr. Devine's alleged breach of a condition of his release on a criminal charge relating to an incident with his wife:

> Fitzpatrick: Frank I understand there's a few problems?
>
> Devine: Yeah, yeah.
>
> Fitzpatrick: I understand you were up at the house.
>
> Devine: Which
>
> Fitzpatrick: Yvette's.
>
> Devine: Nope. Nope. I wasn't up there at all.
>
> Fitzpatrick: Yvette still got the kid.
>
> Devine: Not up there oh you mean in her house.
>
> Fitzpatrick: Yeah. You breached the release (inaudible) sit down for a minute, we're not going to jump on you.

Mr. Devine then explained that he had spoken with Yvette and had obtained permission to pick up his son on this occasion. Detective Fitzpatrick replied:

> Fitzpatrick: Well, you're before the courts and you signed this release, notify change of address in writing, 24 hours, no communication with the Yvette Morin, Glen Bogois.
>
> Devine: Yeah that's right.
>
> Fitzpatrick: Except through counsel and not to possess any firearms and to stay away from Lot 6, Con. 4, well

> that's a breach according to Mills [Officer Mills was the officer investigating the complaint], what you're charged with. Threatening Death by phone.

The potential criminal problems Mr. Devine faced in the course of his matrimonial breakdown were raised by the investigators a number of times during the interview. At one point, towards the end of the interview, Mr. Devine was told:

> Fitzpatrick: I don't think Mills wants charges but you'd better judge yourself accordingly, because Yvette ... I understand Yvette is a little hostile towards you.

Inspector Shephard's recollection was that Detective Mills had telephoned him to ask if either he or his partner would be seeing Mr. Devine and, if so, if they would speak to him about this matter. Inspector Shephard's understanding was that Detective Mills did not intend to pursue the complaint. He denied that he informed himself about this matter in order to assert an element of authority over Mr. Devine to obtain information from him. While he said that he probably raised the issue with Devine to make it easier to gain access to the residence to speak with him, he denied that he used this information for the purpose of intimidating Mr. Devine.

The interview concluded with the following exchange:

> Shephard: When does this case come up that you're involved in?
>
> Devine: Oh right now it's October 10, 1989.
>
> .....
>
> Fitzpatrick: Well good luck on it, don't worry about the charges, I don't think you're going to be charged at our end, so don't worry about it. ... When we were down here that day, well it was all forgotten. ... You don't need that hassle.
>
> Devine: No, as I say, I'm not out there looking for trouble you know.
>
> Fitzpatrick: Didn't think you were Frank. ... Say, I don't think you are but sort of play it cool, you don't

need the hassle from them.

Devine: That's what the Sergeant said at the station, he said what you just said something I have to work out with a lawyer.

Shephard: Yes well, give some thought to what I said to you ... before you know about ... who you discuss that situation with because , ah.

Devine: Which situation

Shephard: The times and dates you remember I asked you who sat down [with] and who you discussed the alibi ... with.

Devine: Oh I see.

In the context of this conversation, Detective Fitzpatrick and Inspector Shephard again questioned Mr. Devine as to his recollection of the events of October 3, 1984, particularly as it related to the statement of Paddy Hester who claimed she saw Mr. Devine with Guy Paul and Alphonse Morin in a truck late that evening:

Fitzpatrick: I want you to think very careful of that.

Devine: That's a long time ago.

Fitzpatrick: I know but this thing certainly is you know not something that you could just put out of your mind, I mean there was a lot involved, we spoke to you a fair amount, I want you to think very careful.

Devine: Hmm-hmm.

Fitzpatrick: About whether you, Guy Paul Morin and his father were out in the truck especially in the nighttime.

Devine: Mmm.

Fitzpatrick: Looking for Christine or whatever you were doing.

Devine: No it was nighttime when I was there, you

> know, in the Bradford house, I can recall it was the time and year, the fall, I guess late fall.
>
> Fitzpatrick: What would you say if I told you that I can put you in the truck with Guy Paul and his father the night she went missing.
>
> Devine: No, I wouldn't agree with that.
>
> Fitzpatrick: What if I told you that I've got a witness that says you were
>
> Devine: Well I don't agree with that.

Inspector Shephard thought that Mr. Devine was lying about the events of October 3, 1984, because, in 1985, he had difficulty recollecting his activities that day, yet subsequently he claimed to remember them. Accordingly, Detective Fitzpatrick and Inspector Shephard suggested to Mr. Devine that he had been told what to say at the December 1985 meeting of all the alibi witnesses:

> Shephard: How do they come up with his story about, you know, Guy Paul getting home at this time and Yvette being there and you being there, and how did ... they arrive at that like, did you's all sit down together and talk about that or did you they say to you this is what we want you to say, or...
>
> Devine: No no.
>
> Shephard: How did they arrive at that then
>
> Devine: Well I don't know I just maybe that's the way it was at that time, you know what I mean
>
> Shephard: yeah, but when we first interviewed you over at your house you had no idea about anything like that.
>
> Devine: What do you mean?
>
> Shephard: Well remember we came over and interviewed you and Yvette in ... Bradford at the Landing there whatever they call it. ... You couldn't remember anything about it then when we were talking

to you Yvette kept saying well I think this is what happened or I think that's what happened or you said, I don't know, I can't remember. So how all of a sudden when we interviewed you down at Ruby's office you had this story that you arrived there, this happened and that happened and then you knew what time it was and so obviously you must have sat down with somebody and came up with that either Ruby or Mary Bartley.

.....

Devine: Maybe at the time Yvette and I talked about it, you (sic) because I guess knowing we were going to be interviewed so I guess we had to sort of really think about this thing you know and just remember what happened I guess being at their place.

Shephard: Yeah, but you know like you're not in any trouble for you know telling us what you told us so don't think that but if you wind up testifying and you probably will at this trial, and you get up there and you say you know this is what happened and the Crown attorney asks you how you arrived at that situation, you know and you lie about it, then you're going to be in big problems. You're going to

Devine: Mo (sic.) there's no lies here. No lies. Everything I said was you know ah, to the best of my knowledge.

Shephard: Yeah but how did you arrive at that that's what I want to know, cause when we interviewed you in you (sic.) house that morning you had no idea you kept asking Yvette, and then even when we interviewed you at Ruby's office, you said that you ... left there to go to the hospital and obviously you didn't because Andrew wasn't even in the hospital you know obviously it would appear that you were receiving instructions from somebody, I don't know if it was from the Morins or Ruby or Mary Bartley or who. That's what it appeared to me anyway you know if you were – all we want to know is who and how did you arrive at that, you know, did they sit down and say well this is what we want you to say or is you know what happened.

> Devine: No, 'cause you know from I (sic) recall there was nothing like that at all you know, that's what I don't understand what you know, you guys recorded everything we said that day and ... you know I have a copy of it somewhere, I don't know, there's no reason for me to lie you know I mean it's just you know, I've got no reason to lie.

Inspector Shephard admitted at the Inquiry that he didn't apply the same degree of scrutiny to witnesses furthering the prosecution against Mr. Morin who had come forward with information years after the event and whose claims of earlier disclosure could not be confirmed. He was asked:

> Q. Well, what do you think we can extrapolate from the way you did give a hard, critical look to defence witnesses who fell into the same kinds of categories [late developing evidence]; do you know what I mean? Like, here's Frank Devine being interviewed by you about his alibi, and there's inconsistencies in his alibi, as you saw it.
>
> And you put to him at one point, we've heard, that: Well, you didn't remember this back in your first interview, and now all of a sudden, you remember it with such great clarity, so how could that be? There's just no way that could be. You engaged in that kind of critical analysis, I'm going to suggest to you, when dealing with evidence that tended to support the defence position; isn't that fair?
>
> A: Yes, sir, that's fair.
>
> Q: Do you think that demonstrates, perhaps, a little bit of a differential treatment between evidence that supported Guy Paul Morin's guilt, and evidence which supported his innocence?
>
> A: Yes, sir, probably.
>
> Q: I mean, we've talked about tunnel vision a lot here, and it's been used by some in a sinister way about deliberately going about to bring about the conviction of an innocent person. And you've made quite clear that certainly was never your intention, but can you see how one fixated on a particular accused can deal with

> evidence differently, depending on whether it conforms to the Crown's theory, or whether it takes away from the Crown's theory? Do you see that now?
>
> A: Yes, sir

He conceded that it was possible that the difference in treatment and evaluation of these witnesses was a result of his firm view that Mr. Morin was guilty:

> Q. And I guess what I want to ask you is kind of looking back with the benefit of some of the things I've asked you about yesterday, do you feel that you subjected those Crown witnesses who testified at the second trial, and who had no recollection that had been disclosed to anyone about events, but later came up with these events five, six years later, to the same kind of scrutiny? Did you do the same thing to yourself at the time? They must be lying because of the way this has come out five, six years later?
>
> A. No, sir, I don't recall doing that.
>
> Q. Do you think that the difference in evaluation may have been a function of how you felt about Guy Paul's guilt or innocence?
>
> A. I hope not.
>
> Q. It's a possibility, though; isn't it?
>
> A. Anything's possible, I guess.

Towards the end of the interview, Inspector Shephard asked Mr. Devine if he had ever been aware of any indication of incest in the Morin family — between Alphonse and his daughters or between Guy Paul and Yvette. Mr. Devine denied this insinuation. During the Inquiry, Inspector Shephard explained the purpose behind this question to Mr. Devine:

> A. Well we had received information from different people ... that there may have been incest in the family, or suspected incest. And again, I was probably using this as a pry to ... push the right buttons.

> Q. I mean you weren't really interested in investigating incest, you were interested in seeing whether you could create a wedge between Frank and Morin family so that his evidence would change. Isn't that fair?
>
> A. Well I think also that if there was incest and Frank said yes ... that would be some information ... valuable to the Crown, because this was a sexual murder. It might show the type of person he was, or what type of family he came from, or something like that.

I should interject that I accept that the officers did not originate the allegation of incest, though they used it in their interviewing process. I should immediately note that no one suggested to me that there was, in reality, any incest.

On April 4, 1992, Mr. Devine was interviewed by Crown attorney Alex Smith. Detective Fitzpatrick was present. His unsigned statement prepared as a result of this testimony meeting contains the following new information:

> On the day we went skating, I remember Guy Paul running around the house yelling "REDRUM". I didn't know what he meant by that until after the first trial.

Mr. Devine also put forward new information relating to Guy Paul's demeanour when he arrived home on October 3, 1984:

> [H]e seemed agitated or in a hurry, or something. He was normally a cool-type guy and just appeared to me he wasn't himself that day.

While Mr. Devine maintained that he had seen Guy Paul on October 3rd, he qualified his statement by saying that he was confused about that day because "I feel that I was going to the hospital to visit my son, but there was something to say that my son was not in the hospital that day."

In his statement, Mr. Devine also alluded to discussions with members of the Morin family concerning the alibi:

> I can't recall if it was before or after Guy Paul's arrest

> ... I remember sitting with Diane, Alphonse and someone else, and we were going over what happened that day. I seem to recall it was in the driveway. I'm sure Guy Paul wasn't there, but I can't remember who else was there.
>
> I also remember being at Mr. Ruby's office, the lawyer at the first trial, and Alphonse pulled me aside and spoke to me before I was to speak to the police. From what I remember, it had to do with the alibi.
>
> I can't remember when it was but I remember on other occasions talking to Mr. & Mrs. Morin and also Yvette about it being connected with Andrew ... being in the hospital that is the alibi.

Mr. Devine was not called to testify at either the first or the second trial.

Findings

To begin with, we have here, once again, examples of investigators pressing their personal views about the guilt of an accused on a potential witness. This, as pointed out elsewhere in the Report, carries with it the danger of poisoning the mind of the witness. We then have the unsubstantiated insinuation that incest may have been practiced in the Morin household. And finally we have the heavy hint — made at the very outset of one interview — that Frank Devine was in trouble, leaving the clear impression that he cannot afford any further problems with the law. Inspector Shephard denied that that was the investigators' intention, yet both he and his partner seemed very well informed about the pending proceedings against him, and the questions put to him went quite beyond a casual mention. While 'intimidation' may be too strong a word to use, 'heavy hint' would not — 'Let's have the truth, Frank, and we won't add to your troubles.' This sentence wasn't spoken, but it certainly hung in the air.

The tone and substance of the interviews appear inconsistent with Shephard's position that investigators remained 'open-minded' about the alibi and Guy Paul Morin's guilt or innocence. The suggestion to Shephard that the interviews were designed to 'destroy the alibi' is certainly an inference which can be drawn from their content. At this point, the

investigators did not believe the alibi, did not believe Morin to be innocent, and did consider Devine to be the 'weak link' in the alibi, given his difficulties with his wife and with the law. In the investigators' view, Devine, before the break-up of his marriage to Guy Paul Morin, may have considered himself bound by family constraints to support his brother-in-law's alibi. Now, almost four years later, Inspector Shephard and his partner felt that this kind of approach to Devine might extract from him the 'true' version of events.

I cannot say to what extent, if any, the interviewing by Mr. Smith contributed to the problem. Mr. Smith was not questioned about the April 4, 1992 interview at the Inquiry. I can say, though, that at the end of the April 4, 1992 interview (if not sooner), Devine appears to reflect that Morin seemed agitated or in a hurry on October 3, 1984 and *wasn't himself that day.* Given the interviews which we know about prior to April 1992, and the unlikelihood that Morin was *agitated or other than himself* that day, it would seem that the interviewing process, at some stage, once again, produced unreliable evidence.

Returning to the interviewing techniques used by the investigators with Frank Devine, an additional issue arises. I have no hesitation in criticizing the use of such techniques (communicating Morin's guilt, discussing the evidence, telling the witness that he or she is wrong, etc.) when most witnesses are interviewed. These techniques contaminate witnesses. However, I do not wish to be taken as suggesting that police should never be free under any circumstances to pointedly question potential witnesses whom they believe to be lying to protect an accused, or even the accused himself or herself, so long as such questioning does not violate *Charter* protections or otherwise violate the law. The police have the right, indeed the duty, to effectively investigate crime; this often does not involve a completely tranquil and non-suggestive environment. As my later recommendations suggest, one protection against the use of unfair investigative techniques or techniques which are likely to promote an unreliable account from witnesses is the taping of interviews.

It follows that my concern about the officers' interplay with Frank Devine is not that they critically questioned a witness whom they believed to be lying to protect the accused, but rather, that some of the techniques used were inappropriate. Further, it is my view that the officers never really did

investigate the alibi in an open-minded fashion; their approach throughout was to demonstrate that the alibi was false.

(v) Privilege and the Alibi

After the Supreme Court of Canada affirmed the order for a new trial, Guy Paul Morin retained Jack Pinkofsky as his counsel. In September 1989, four years after the alibi notices had been sent, Inspector Shephard and Crown attorney John Scott decided to speak to Bruce Affleck, Mr. Morin's original counsel, to establish whether Ida and Alphonse Morin had based their recollections of the events on October 3, 1984, on their grandson's hospitalization. While Mr. Scott could not recall whose idea it was, he agreed that the objective was to gather information to destroy any alibi advanced at the forthcoming trial. According to Inspector Shephard, it was his idea, approved by Mr. Scott. Shephard said that he approached Mr. Affleck (as opposed to Mr. Ruby who had represented Mr. Morin at the first trial) because he knew Mr. Affleck through many dealings with him over 27 years.

This meeting took place on September 19, 1989, and they were joined by Mr. Affleck's partner, Alexander Sosna. Inspector Shephard's notes for that interview reflect the following discussion:

> I asked about Mr. Morin's alibi and if Alphonse and Ida were present when it was adopted. And Mr. Sosna said it was a round-table discussion on more than one occasion. Couldn't recall exactly what was said, or who was present. Will check file to jog memory and call me. And then Mr. Affleck said he recalls Ida and Alphonse being present during discussions about Yvette's son being in the hospital. In fact, when they found out the hospital records showed he wasn't admitted until October 4th, Alphonse said the hospital records were wrong. Mr. Affleck said he will check the file and call me back.

On September 21, 1989, Inspector Shephard received a call from Mr. Sosna advising him that the Law Society of Upper Canada had said that, without Mr. Morin's consent, any discussion about the alibi could not go behind the 1985 letters.

The position of counsel for Mr. Morin on appeal, as well as before the

Inquiry, was that Guy Paul Morin's solicitor-client privilege was violated by his previous lawyers, as any information obtained concerning his defence fell well within the 'work product privilege.' In its factum on appeal, the defence further asserted that the violation went to the heart of Mr. Morin's defence — the integrity and reliability of his alibi.

Mr. Scott maintained that the information concerning the alibi was not privileged. Ms. MacLean, too, expressed the opinion that once the alibi notice had been sent, privilege had been waived with respect to the alibi at large. Further, there was no solicitor-client privilege between either Alphonse or Ida Morin and their son's lawyer. Mr. Scott could not recall addressing his mind to notifying Guy Paul Morin about the interview with his former counsel.

It was conceded, in written submissions at the Inquiry by counsel for Mr. Morin, that Inspector Shephard should not be criticized for his actions since he consulted beforehand with Mr. Scott. And insofar as Mr. Scott was concerned, Mr. Morin's counsel conceded that it was difficult to be too critical of him because both Mr. Affleck and Mr. Sosna were experienced counsel.

Findings

First, no blame should attach to either Inspector Shephard or Mr. Scott on this issue. As a non-lawyer, Inspector Shephard could not be expected to know about the intricacies of the law of privilege; and as for Mr. Scott (who could be expected to know about solicitor-client privilege), I accept that, rightly or wrongly, he regarded the information concerning the alibi not to be privileged. In any event, it would not be unreasonable to take the approach: "Ask them, and if they can't tell you because of privilege they will say so." Second, Mr. Affleck has since passed away. Mr. Sosna is not a party to this Inquiry. I find it unnecessary to decide whether or not Messrs. Affleck and Sosna breached their client's privilege. But I do suggest that, in future, it would be preferable if the Law Society's views were obtained in advance of any conversations with an investigator. More to the point, any assertion of privilege is for the client to make or to waive. Accordingly, the best approach, where counsel perceives any potential privilege to arise, is to ascertain the position of the client through his or her present counsel.

(vi) The May - Morin Conversation

On July 1, 1985, following his preliminary hearing, Mr. Morin engaged in a surreptitiously tape-recorded conversation with cell mate Robert May in which he discussed his activities on October 3, 1984. The transcript of the conversation includes the following excerpts relating to Mr. Morin's alibi:

> May: OK. How long were [you] in [Dominion]?
>
> Morin: Well it takes easily 15 minutes, easily.
>
> May: OK, so ... say 15 minutes so that puts us at 4:25 right?
>
> Morin: Yep
>
> May: OK, so 4:25 ok, and then you went to Loblaws and you were there how long?
>
> Morin: Well, I, it's - um, minimum, minimum ah again another 20, fifteen minutes, twenty minutes.
>
> May: OK, so we'll say 10 to 5 right ok, so we got
>
> Morin: This is really cutting it short
>
> May: OK, OK, 4:50
>
> Morin: And again we'll say another ...
>
> May: Mr. Grocer
>
> Morin: 20 minutes for Mr. Grocer
>
> May: Where is Mr. Grocer, did you have to drive there?
>
> Morin: Oh yeah, you have to drive one to the other
>
> May: OK, so OK, alright
>
> Morin: They're all close to each other but I drive --
>
> May: OK

Morin: Instead of me walking (inaudible)

May: All right OK, so 4:50 and then you got to Mr. Grocer

Morin: It would take um maybe another 3 minutes to get to Grocers, but ah we'll say another 20 minutes at Mr. Grocers.

May: OK so 20 minutes, so that puts us at ah ten after 5. So we got 5:10 now and from, from there you came home right?

Morin: OK.

May: You came home from there?

Morin: Yeah, hold on. Um see, I'm not sure if I picked up gas.

May: OK.

Morin: I would think I picked up gas.

Morin: OK, so you picked up gas.

Morin: The car — the car, inside the car I guarantee it I have right from 1977 when the car was brand new...

May: Yeah.

Morin: Every day.

May: All the receipts.

Morin: Yeah.

May: How've you got them?

Morin: My dad's got to book it up but then I, I, I have lots of pieces of paper showing the gas mileage. Now it might be in there that I picked up gas that particular day.

May: Yeah.

Morin: Uh, but I, I believe I left Loblaws at twenty after five.

May: Twenty after five, OK.

Morin: Oh not exactly, it's been quarter after five, quarter after five.

May: OK, so 5:15.

Morin: Yeah.

Guard: (inaudible)

May: So, so far (dinner time) so far you're fucking covered, so far your ass is covered, like you should have said this right off the bat and your, your ass would have been covered.

Morin: Yeah.

May: You went from there.

Morin: That's right, but this will be a surprise to them, ok?

May: Yeah, but OK, so you went from here, you went from the Mr. Grocer and shit and you went home, right.

In a later portion of the tape, the conversation continued:

May: OK, so 5:30 ok so you from 5:30 from Mr. Grocer to your house you said was fifteen minutes right.

Morin: That's right

May: From the mall to your house ok, so we got quarter to six so ok, so right oh, so we're looking at quarter to six.

Morin: I got home, I even noticed that immediately. [Mrs. Morin's car was parked backwards.]

The transcript of the July 1, 1985 tape-recorded conversation also

contains the following excerpt:

> May: Loblaws you left Loblaws at 5:15, I thought you said you left Loblaws at 4:50, Mr. Grocer at 5:15.
>
> Morin: No, for sure Loblaws, I know for sure.
>
> May: Ok, so you left Loblaws at 5:15 big fucking deal — fuck off asshole.
>
> Morin: Mr. Grocer would be (pause)
>
> May: Ok.
>
> Morin: Give her 10 - 15 minutes from there, so it would be 5:30 .
>
> May: OK, so 5:30 at Mr. Grocers, right on. So from Mr. Grocers home, you know gas station you went for gas.
>
> Morin: na, na
>
> May: You didn't go get gas?
>
> Morin: No it would be right after ah Dominion, I would get gas, but I can't recall if I did, that's my problem.
>
> May: Ok, well you would have a receipt in your car anyway.
>
> Morin: That's right.
>
> .....
>
> May: OK, so 5:30 ok so you from 5:30 from Mr. Grocer to your house you said was fifteen minutes right.
>
> Morin: That's right
>
> May: From the mall to your house ok, so we got quarter to six so ok, so right on, so we're looking at quarter to six.

> Morin: I got home, I even noticed that immediately.
> [Mrs. Morin's car was parked backwards.]

During the conversation, Mr. Morin enlisted Mr. May's assistance to obtain verification of his alibi upon May's release from jail. Morin asked May to get a picture of him from his parents to enable Mr. May to take it to the various shops where he had gone after work to see if any clerks could recall seeing him on October 3, 1984.

It is interesting to note that Detective Fitzpatrick and Inspector Shephard did this very thing three weeks later. They attended the grocery stores in which Mr. Morin indicated he had shopped, with a photograph of Morin.

On June 7, 1985 Detective Shephard received a telephone call from Jan Stem, a band member. She advised that Alphonse Morin had told her that he was positive that Guy had arrived home from work at 5:30 (within two minutes one way or the other) and that he recalled Guy coming in with grocery bags in his arms. According to Shephard's notebook entry:

> She asked if these times were not accurate, and I advised her that either they were mistaken or lying, and I asked her if she was certain about the 5:30 time that Guy arrived home. She said yes, Al Morin was positive that it was 5:30, two minutes one way or the other. She also advised that Ida Morin was present during this conversation.

Inspector Shephard acknowledged that he may have tainted Ms. Stem's evidence concerning her conversation with Alphonse Morin wherein he took a position on the time which was consistent with the alibi defence ultimately tendered at trial.

It was the position of counsel for Mr. Morin that the investigators sought to destroy Mr. Morin's alibi when interviewing alibi witnesses. Both Detective Fitzpatrick and Inspector Shephard denied this allegation and insisted they attempted to *confirm* the alibi. In July, 1985 the investigators attended at the shops named in Mr. Morin's alibi letter (and at a Mr. Grocer's store, not mentioned in the notice but discussed with Mr. May on July 1, 1985). Shephard described the investigation of items which may have been

on sale at supermarkets. Fitzpatrick obtained the payroll schedules of the Loblaw's store to determine who was working on October 3, 1984. Inquiries were made to determine if anyone could confirm that Mr. Morin had made a purchase at any of the grocery stores at the relevant time. No one could — which is hardly surprising.

(vii) "How Do We Destroy the Alibi?"

On December 12, 1990, a meeting took place involving Crown counsel Leo McGuigan, Alex Smith, Brian Gover and Susan MacLean. Ms. MacLean's notebook contains the following notation: "How do we destroy the alibi?" When asked about this statement, Ms. MacLean cautioned against attributing more to the word "destroy" than was intended in the conversation. She said the comment was directed towards challenging the alibi with a view to establishing it was false. In this regard, the issue was how to marshal all available relevant information.

Her notes and a list of things to do dated March 4, 1991, make reference to a series of steps to be taken, including legal research on tendering alibi notices as prior consistent statements, reviewing the evidence of May, which was said to suggest the alibi was being developed, checking the hospital records for error, reviewing the evidence of the Morin family for purposes of cross-examination and reviewing the statements of Frank and Yvette Devine. The March 1991 notes also refer to arranging a meeting with Mr. Devine, if possible.

Mr. McGuigan recalled advising the group that he thought the alibi evidence was very important. It was his belief that Mr. Morin was acquitted after his first trial on the basis that the jury accepted the alibi evidence in conjunction with the psychiatric evidence (explaining Mr. Morin's 'strange' utterances). The psychiatric evidence is discussed in more detail below.

(viii) Trial Evidence

Guy Paul Morin testified at his trials that after punching his time card at 3:32 p.m. he drove to the Upper Canada Mall in Newmarket, parked at the second level near the Dominion store, and went downstairs to the kiosk

where he bought an 'Early Bird' lottery ticket from a clerk named Sue.[34] He then took the escalator up to the Dominion store and did some grocery shopping before returning to his car. He may have purchased gasoline, as he usually did once or twice a week. He then would have gone diagonally across the intersection to Loblaws and purchased some bulk food items. From there he proceeded up the street to Mr. Grocers. He could not recall whether he went inside the store, but said that he would have reviewed the bulletins in the window for specials.

He testified that he *would have* arrived home between 5:00 and 5:30, just as Frank Devine, his brother-in-law, was leaving. He brought at least two grocery bags into the house and put them on the kitchen table near the microwave oven. His parents and his sister, Yvette, were inside. He *would have taken* his customary nap for half an hour, had supper at about 7:00 and then went outside to assist his father with work on the house.

In his closing address to the jury, Leo McGuigan commented on the fact that much of Mr. Morin's memory simply relied on extrapolation from his regular routine, as evidenced by his expressions during his testimony of "I would have" done this, "I would have" said that, or "I would have" been there.

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[34] Susan Scott testified on behalf of the defence at both the first and second trial. It was the position of the defence that she provided important circumstantial evidence of the truth of the alibi of Guy Paul Morin for Wednesday, October 3.

Ms. Scott's evidence at trial was that Guy Paul Morin purchased a ticket from her once a week between 3:45 and 4:30 p.m. She only worked afternoons on Wednesdays and Fridays. She did not work every Wednesday. The Early Bird ticket had to be purchased between Sunday and Wednesday. In cross-examination Ms. Scott could not recall telling the police in the summer of 1985 that Mr. Morin bought tickets mostly on Fridays and sometimes on Thursdays. She had since reviewed her work records as to the days she worked and testified this information was erroneous. She confirmed she worked the afternoon of October 3, 1984 but could not say whether Mr. Morin purchased a ticket that day.

Ms. MacLean testified that at the time of the second trial Crown counsel did not consider it necessary to disprove Ms. Scott's evidence in order to prove that Mr. Morin could have been home in time to abduct Christine Jessop.

During the first trial, John Scott's personal belief was that the alibi was fabricated. His style of advocacy, however, was to permit witnesses the opportunity to admit error, as opposed to confronting them directly with accusations of lying. Accordingly, his position in Court was that Mr. Morin's parents were *mistaken* in the evidence they provided about his activities on October 3, 1984.

The Crown's position at the second trial, however, was that the alibi was fabricated by Guy Paul Morin and his parents and, as such, was indicative of consciousness of guilt. At the request of the Crown, the trial judge directed the jury that several items of evidence relating to alibi were capable of proving concoction and might be indicative of consciousness of guilt. Some of the items upon which the Crown attorneys relied are set out below:

1. Details surrounding the alibi were too specific; for instance, alibi witnesses were able to say with certainty how many shopping bags Mr. Morin carried when he arrived home, where he placed them in the kitchen and, to a certain extent, what the contents included;

2. The defence tendered about 20 grocery receipts covering the period of August to November 1984. These receipts were relevant to the alibi because Mr. Morin calculated his arrival time home on the basis of the time he left work on October 3rd and the various places he shopped before arriving home. Mr. Morin testified that, according to his habit, he did the family shopping once a week on the way home from IIL. He further testified that when he did the shopping, he would go to three stores and, as a result, could not have arrived home in time to abduct Christine Jessop on October 3rd. Some of these receipts had been located pending Mr. Morin's first trial by Alphonse and Ida Morin. Guy Paul Morin located more of these receipts prior to the second trial. He indicated that he kept these receipts in a paper bag in his bedroom. While he had done his best to find receipts for that time period, the collection was incomplete.

The Crown introduced a chart analysing the *time-stamped* receipts put forward by the defence. In his later submissions, Mr. McGuigan relied on this evidence to show weaknesses in the Morins' claim that he did the family shopping once a week, on Wednesday, and would go to three stores; these receipts demonstrated no such pattern of shopping. Moreover, no receipts were found for October 3, 1984.

In his submissions to the Commission, Mr. McGuigan said:

> We will never really know if there were additional grocery receipts ... is it just an unfortunate coincidence that all the grocery receipts Mr. Morin introduced put the lie to his alibi without one supporting him?

During the Inquiry, Ms. MacLean testified that an analysis of receipts by Crown counsel established that he could have gone shopping and still been home by 4:30. She said:

> When a claim is made and you prove that claim to be incorrect, that's a factor in terms of credibility.

Thus, the alibi evidence was left to the jury as evidence capable of establishing concoction. Mr. Justice Donnelly told the jury in this regard:

> The accused spoke of his habit of bargain shopping at three stores over an hour or more. The grocery receipts filed call into issue the time required to shop, whether he shopped regularly at more than one store, and whether he shopped for the entire family. The amounts of the purchases and the evidence of his father may be taken to indicate he did not do the principal family shopping. The times on the grocery receipts plus 10 or 15 minutes to get to his home may be taken to indicate on occasion he could shop after work and still be home by 4:30 contrary to the evidence of the accused and of his mother.

In their final submissions to this Commission, Messrs. McGuigan and Smith say this about the grocery receipt chart prepared by the Crown:

> This chart was a piece of demonstrative evidence that dealt a telling blow to Mr. Morin's alibi. It is respectfully urged that the formulation and introduction of this chart into evidence was one of many examples of the high calibre advocacy of the prosecution team in this case and brought home to the jury in strong fashion the weaknesses of Mr. Morin's alibi and contributed to its undoing.

I agree that the chart was a piece of demonstrative evidence that represented good advocacy by the Crown. I am not prepared, however, to call it a "telling blow," although it may well have contributed to the alibi's undoing.

3. The fact that Mr. Morin was not consistent in his estimates of his arrival time was also left to the jury as evidence capable of proving fabrication. As stated by the trial judge:

> The accused has given different versions of the critical time of his arrival home from work on October 3rd, 1984. In the tape-recorded portion of the February 22nd, 1985 statement, he said after shopping he arrived at 4:30. And the later portion of that statement, according to Inspector Shephard's note, he said 4:30 to 5:00. In the alibi notices that time is stated to be approximately 5:30. In his testimony at this trial, the accused said after shopping he arrived home at 5:00 to 5:30. On the basis of those contradictions, you may find one or more times to be fabricated.

The position of defence counsel was that the inconsistency in Mr. Morin's timing estimates were honest mistakes, more consistent with innocence than with 'contradictions' indicative of guilt.

It was the position of the Crown that Mr. Morin extended his time of arrival at home in accordance with the

Jessops' change in time of their arrival home.[35] In explaining the position that Mr. Morin was changing his times because he was lying and not because he could not precisely remember them, Ms. MacLean referred to the assessment of this evidence by her and her colleagues in light of all available information, not in isolation.

Mr. McGuigan acknowledged that the jury may also have inferred that Mr. Morin changed the time of his arrival home when speaking with Mr. May in July 1985 in response to Janet Jessop's evidence at the preliminary inquiry. The jury did not know that Mr. Morin's evidence at both trials (*i.e.* that he arrived home between 5:00 and 5:30) was not inconsistent with what he had said at the time of his arrest.

However, in his view, the admission of the April 22, 1985 statement would not have helped Mr. Morin:

> Q. [I]f I was on the jury and I heard the following: I got home at 4:30, shopping made me late. Next, 4:30 to 5:00, next 5:30 to 6:00 to 6:30.[36] Now, it ends up with Mr. May, as I recall, the last time being that of 6:30. If that does not demonstrate a change in arrival at home, then my logic's no good.

Mr. McGuigan conceded that the jury may have also assumed that the first time Mr. Morin referred to the fact that he purchased a lottery ticket on October 3, 1984, was when he told Mr. May about it during their July 1, 1985 conversation. In fact, Mr. Morin told the police on April 22, 1985 that he

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[35] But, as suggested by counsel for the Morins during the Inquiry, when Guy Paul told the police at the time of his arrest that he arrived home between 5:00 and 5:30, he was unaware that Janet Jessop's time of arrival had been extended by her to 4:30 to 4:35 p.m. The only time given in media reports, including the "Citizen's Alert" documentary which had aired April 14, 1985, was the Jessops' 4:10 time.

[36] Mr. McGuigan agreed that times discussed in the unrecorded portion of the May/Morin conversation were dependent upon Mr. May's truthfulness. (Counsel submitted the latest time referred to in the tape was 5:45 p.m., by taking Mr. Morin through his activities and adding the time as they went along).

had done so.

4. Guy Paul Morin testified at the second trial that in the late evening of October 3, 1984 two police officers, one with a dog, came to his door asking if he had seen Christine Jessop that day. He told them he hadn't seen her as he had been in Toronto working. He was asked when he got home and told them he arrived home between 5:00 to 5:30 p.m. after shopping. Constable David Robertson (as discussed elsewhere in this Report) had provided evidence during the trial that after his dog Ryder was put in the police car, he and Constable James McHardy went to the Morin property and knocked on the door to ensure their dogs were inside the house. During his testimony, Constable Robertson was not examined about speaking with Mr. Morin. Crown counsel Susan MacLean specifically asked that a direction to be given to the jury on the failure of the defence to cross-examine Robertson about his conversation at the Morin residence and, Mr. Justice Donnelly charged the jury as follows:

> Robertson was not cross-examined about...the accused providing information he had shopped after work and the time of his arrival home.
>
> As a result, Robertson had no opportunity to deny the accused said, a) He was shopping; b) He had arrived home at 5:00 to 5:30 p.m., if you regarded that as untrue.
>
> .....
>
> In assessing the weight to be given to the accused's evidence that he told officers that night he was shopping and got home at 5:30, you should bear in mind that Officer Robertson and Ken Jessop were not questioned by the defence on those points.

This evidence was also included in that aspect of the charge setting out evidence from which concoction could be inferred, as follows:

> In the accused's evidence he told the officers with the

> dog on the night of October 3rd he went shopping after work and arrived home at 5:30. This was challenged by the Crown as a self-serving fabrication by the accused.

It was the position of Mr. Morin, through his counsel at the Inquiry, that given the defence position that Robertson's evidence was a 'tissue of lies,' it made no sense for the defence to cross-examine him on these points especially in light of the fact that the Morins did not identify the officer with the dog with whom they had a conversation.

5. Mr. Morin's evidence at the second trial was that he could not remember whether he went inside Mr. Grocers but he drove there and did check the bulletins on the window, reviewing the prices. He testified that in his discussion with Mr. May, he added in 20 minutes for this stop as this was approximately how long it would have taken had he shopped there.

In his closing Mr. McGuigan asked the jury:

> [T]o give close consideration to the conversation between the accused and Mr. May when the accused recruits him to check out his alibi. He states at one time he spent 20 minutes at Mr. Grocers. That, I submit, in the light of the evidence that we have heard, in itself confirms that the accused was constructing a false alibi, trying to work out or cook up an alibi together with May. During the discussions with May they have the accused returning home at approximately six p.m. I submit that the conduct of trying to work out the details is part of the evidence from which you can conclude that the alibi was being fabricated.

The trial judge instructed the jury that in considering whether the alibi was concocted, they should consider this:

> In discussing the alibi with Mr. May, the accused spoke of allowing twenty minutes for his time spent at Mr. Grocers. His trial evidence was he didn't shop at Mr. Grocers on October 3, 1984. He may have stopped there to check the daily specials.

6. Mr. Morin's request of Mr. May to obtain a photograph of him to show to employees at the stores to see if anyone remembered him. This request was put forward by the Crown at the second trial as evidence of Mr. Morin's consciousness of guilt. Ms. MacLean testified that the nature of the discussion between Mr. Morin and Mr. May suggested an attempt by Mr. Morin to 'shore-up' his alibi and make it stronger.

Mr. McGuigan told the jury:

> It is clear on the tape that the accused was endeavouring to enlist Robert May's assistance in refining a false alibi, making it stone rock hard, as Mr. May said. Why else would the accused ask Mr. May to investigate his alibi? Do you ask a fellow inmate to find support for your truthful alibi or do you leave that task to your defence counsel and their investigators.

The Crown Attorney left this item to the jury as evidence capable of establishing fabrication.

The trial judge said:

> The accused's suggestion that May get a photograph from Morin's parents to enable May to check on the alibi which would be consistent with attempting to verify a legitimate alibi claim, although it was about eight months after the event.

7. The trial judge also referred to the following evidence as capable of establishing concoction:

> Subsequent to this claimed announcement [to York police] on October 3rd of his 5:30 arrival, the accused told May on tape that he informed the Durham officers he got home at 4:30. He claimed to May to have made an oversight in that 4:30 time, because he didn't allow time for shopping, and to May, he revised his arrival time to 6:00 p.m. However, during the February 22nd interview when he told Durham officers Shephard and Fitzpatrick 4:30, he twice referred to the fact he had

> been shopping.
>
> Mr. May testified that on June 30, 1984 [an untaped conversation] Mr. Morin first said he arrived home at 4:30 and later in the conversation changed it to "six or six-thirty. I'm not quite sure on the time." According to May's evidence, when he inquired as to the discrepancy between 4:30 and "six or whatever it was",Mr. Morin seemed to have misunderstood whether May was asking him the time he told the Durham police or what he told York. Morin explained to May that he told Durham he was home at 4:30 because he forgot he had shopped. He told York he was home at 6:00 p.m. approximately.

8. In his review of evidence, the trial judge also itemized the following as evidence capable of establishing fabrication:

> The tape recording of the accused and May discussing the alibi, and May's evidence at trial as to their discussions of his perceived deficiencies in the alibi.

The trial judge also instructed the jury to consider, in determining whether the alibi was fabricated, the evidence of Alphonse Morin, Ida Morin, and Guy Paul Morin, all of whom denied any concoction or fabrication of the alibi.

The trial judge reviewed the above evidence, said by the Crown to be indicative of a concocted alibi, and told the jury they could consider:

- whether there is any evidence of fabrication in witnesses whose testimony tends to show that the accused gave a false account of his whereabouts;
- whether the accused has given different versions as to his whereabouts, one of which may be concocted;
- the intelligence of the accused;
- the relative significance of the events disclosed in the alibi;

- the objective likelihood of honest mistake about those events;

- the emotional conditions of the accused when he gave the alibi information; and

- the consistency or otherwise of the account by the various witnesses.

(ix) Crown Closing

In Leo McGuigan's closing address to the jury he said this about the Devine aspect of the alibi:

> Now it's the Crown's position and submission that this is a fabricated alibi. In essence, it's a very simple alibi to keep straight. One, the accused got off work approximately 3:30 p.m., he went shopping, came home with two bags of groceries, got home around 5:30, parents present, sister Yvette and husband Frank Devine were present. And I submit to you that the son-in-law and sister were inserted into the line-up because some people might feel that the mother and father might go out of their way to fabricate an alibi to assist their son. I submit it was important to involve Frank Devine, who although related by marriage, was not a blood relative.
>
> It is submitted that the family got together at some time and certainly prior to the alibi notice being sent out by the accused's counsel to the Crown and concocted this alibi. The central point was to be that that was the day, October the 3rd, '84, that baby Andrew went in the hospital. This accomplished two things: gave a reason for Frank Devine and Yvette to be at the house that day to talk about Andrew going into the hospital, and two, a reason to remember the day.
>
> Subsequently, and I submit that after August 14, '85, a serious -- because that's when the last alibi notice was sent out on August 14th (sic) -- a serious problem developed. The police ascertained through all the

hospital records that Andrew was admitted to the hospital not on October 3rd, but October 4th, '84. Now this was a serious problem and how to you get around it? Well, the first thing is to disassociate yourself from Andrew. Andrew? Andrew who? He wasn't' there October 3rd, '84, never asked about him. He might have been left in the car in the driveway. Let's forget about Andrew. Let's talk about the reporters on October 4th, '84, the Sun reporters. That's our new Andrew. At least it was, in my submission, for Mr. and Mrs. Morin.

.....

Their denial that they sat down with the lawyers and discussed this alibi. What kind of lawyer would send out a letter that I read to you without sitting down and discussing it with the people that are involved?

.....

Andrew Devine. [Ida Morin] had previously babysat him. Doesn't recall him being present at the residence on October the 3rd. Doesn't recall any questions from [Mr. Affleck and Mr. Sosna] about whether Andrew was in hospital. Remembers the day Christine went missing because of reporters the next morning, not because of Andrew going in the hospital.

Acknowledges meeting at [Mr. Affleck and Mr. Sosna]. And as I indicated to you, Mr. Affleck and Mr. Sosna were the lawyers who were defending the accused. They prepared the documents at that time as part of his defence and I submit that common sense would indicate that they would not send out such a document without checking it out with the people that were involved.

.....

[Alphonse Morin] [s]ays about his meeting with Affleck and Sosna and the alibi, he says it may have happened, had a lot of visits but he can't recall specific visit with Ida, Yvette and Frank Devine. Doesn't say it didn't happen, just can't remember.

(x) Crown Attorney's Opinion Regarding Alibi

It was Mr. Gover's opinion that the failure of Mr. Morin's alibi was "a principal reason for the conviction." He made reference to the dissenting judgment of Cory J.A. (as he then was) of the Ontario Court of Appeal, who expressed the view that Mr. Morin was acquitted at his first trial because the jury either believed his alibi or the alibi created reasonable doubt. Mr. Gover said that the jury at the second trial clearly did not believe Mr. Morin or his parents on the alibi issue.

In her evidence before the Inquiry, Ms. MacLean said that she now believes that Mr. Morin and his parents were honestly mistaken about aspects of the alibi, but that, at the time of the second trial, the family's certainty was problematic:

> In hindsight, I've thought about ... the whole alibi issue, and clearly the Morin family, all of them, were trying to reconstruct what had happened several months before. I thought to myself, I couldn't tell you what I did six months ago. I suppose there were - the event of Christine disappearing was a ... -- a significant event in the community that you may be able to recall certain events of that day.... But to try and remember that somebody brought in a bag of groceries[37], or something like that, I would think would be difficult.
>
> .....
>
> I suppose if Mr. Morin or his family had said, look, it's so long ago, we really just can't remember exactly what happened, but that wasn't the approach taken. It was that we do know what happened. This is when he was home. This is what he was doing. And some of the things we were able to demonstrate weren't correct, so, unfortunately, that -- ... in its result, I think, cast doubt on their credibility on those issues.

Leo McGuigan, too, during the Inquiry, commented that the

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[37] Ms. MacLean recalled that alibi witnesses when first called upon were able to say with certainty how many shopping bags he arrived home with and where he placed them.

specificity of the number (and even content) of grocery bags was problematic. He told the Inquiry that he maintained his belief that Mr. Morin and his parents perjured themselves in their evidence as to Mr. Morin's whereabouts on October 3, 1984. In his final submissions to the Commission, he attributed Mr. Morin's actions, in this regard, to the panic of an innocent man.

In his evidence at the inquiry, Mr. Smith accepted that Mr. Morin may have come home at 5:30 p.m. on the day in question but he still does not accept all aspects of the alibi. He no longer, however, attributes what, in his view, were serious problems with the alibi to the fact that Mr. Morin and his parents were lying. Mr. Smith's impression at the time of the second trial was that Mr. Morin knew the time he arrived home and changed it. He also viewed Mr. Morin's discussions with Mr. May on June 30, 1985 as an attempt to enlist Mr. May's assistance in framing a false alibi.

(xi) Finding

There was a lengthy debate at the Inquiry over the Crown's conduct in connection with the alibi. The position advanced on behalf of the prosecutors was, simply put, that they regarded the alibi to be false and were fully entitled to draw upon any perceived weaknesses in the alibi to full effect. The position advanced on behalf of the Morins was that the prosecution converted exculpatory evidence and innocent conversations into incriminating evidence as a result of their tunnel vision or their desire to secure a conviction.

Mr. Morin's proven innocence casts a different light upon many of the problems which the Crown attorneys identified with the alibi defence. This is not surprising. However, I see no impropriety in the approach taken by the prosecutors to the alibi at trial. I have no doubt that they believed that the alibi was false. This necessarily followed from their view, also genuinely held, that Guy Paul Morin was guilty. There were weaknesses that could be exploited in the alibi. The prosecutors were highly skilled in doing so. Of course, their approach meant that they gave sinister interpretations to conduct which is equally capable of an innocent explanation. However, in this instance, I do not say that their approach was unreasonably coloured by

tunnel vision. (Though, as I note below, Mr. McGuigan does have a certain tunnel vision now about the truth or falsity of the alibi.) The inferences which they asked the jury to draw were supported by the evidence (and indeed, in some instances, by uncontested evidence of prior statements made by Mr. Morin). They were entitled, as well, to rely upon the 'improvements' in the recollections of the defence witnesses to try to undermine the alibi. Ms. MacLean's notes about 'destroying the alibi' are inflammatory now, given Mr. Morin's proven innocence. I accept her explanation, however, that the term meant no more and no less than that the prosecutors felt the alibi was false and that they would marshal their full legal resources to demonstrate that.

The debate as to alibi heated up at the Inquiry because counsel for the Morins perceived that Mr. McGuigan, in articulating the problematic aspects of the alibi and other parts of the defence case, appeared to be re-arguing the case today, as if Mr. Morin was still on trial. Accordingly, the debate degenerated somewhat.

I have no doubt that Guy Paul Morin and his parents did not fabricate their evidence. I can also understand why Mr. McGuigan's approach to the issue at this Inquiry was so vigorously challenged. Mr. McGuigan's present opinion that the Morins lied (and were not just mistaken) about the alibi, knowing what he knows today, does demonstrate substantial tunnel vision. Of course, innocent persons can lie, out of panic, about an alibi. However, a continued resistance (even now) to the notion that Guy Paul Morin and his parents might have been mistaken, is a justifiable cause for concern. Be that as it may, the prosecutors committed no impropriety in approaching the issue of alibi in the way they did at trial.

I wish to draw a distinction between the position of the Crown and that of the investigators in this regard. The prosecutors inherited a case where the accused stood charged with murder. The investigators were responsible, in the first instance, for determining who committed that crime. The investigators demonstrated real tunnel vision in their approach to the alibi. Their investigation, even before Guy Paul Morin was arrested, was intended to disprove the alibi, rather than consider it in an open-minded way. I made this point earlier, in the context of their interviews with Frank Devine.

F. Conduct of the Defence and Crown

(i) Introduction

I have already explored the conduct of the Crown in the context of specific issues or testimony. This part of the Report examines more general issues of conduct relating to the defence and the Crown.

(ii) The Traditional Role of the Parties

The Crown

The Supreme Court of Canada has articulated the 'dual role' of Crown counsel. Recently, as I have noted earlier, I was provided with amendments or additions to the Crown Policy Manual which are responsive, in part, to the issues raised at this Inquiry. The new preamble to the manual says this:

> Crown counsel play a pivotal role in the criminal justice system. Only Crown counsel empowered to fully and independently exercise their discretion can bring about a fair trial of those accused of an offence and the protection of the many interests of the public. This book of Crown policies contains dozens of guidelines and directives drafted to assist Crown counsel in the exercise of their discretion.[38] It will also serve to make the exercise of discretion more transparent and understandable to the public.
>
> There are also many discretionary decisions made daily by Crown counsel that are not specifically described or captured by these policies. In general, Crown counsel should exercise their discretion in

[38] A partial list of the decisions which falls within Crown counsels' discretion would include: charge screening, plea resolution, providing disclosure, taking over a private prosecution, stay proceedings, electing a mode of procedure, determining what evidence to call at a preliminary inquiry, determining which witnesses and the order in which they will be called at trial, taking a position with respect to sentence and determining whether to launch a Crown appeal.

keeping with the spirit of the other policies in this Manual. This means that Crown counsel must always remember that an accused is innocent until his or her guilt is proven beyond a reasonable doubt in the courtroom. We are to seek the truth above all else in our decisions and prosecutions. We are to be fair and judicious in our decision-making. The adversarial system in which we operate requires our participation as strong advocates but it also is seriously flawed if the "adversaries" are not evenly matched. We have, therefore, a special duty to ensure that the defendant and his counsel are able to fully and fairly place their evidence and arguments before the court.

The Courts have described the role of Crown counsel on many occasions. [footnote herein omitted] The following two observations from the Supreme Court of Canada provide a particularly helpful summary of our complex function within the criminal justice system:

> It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.[39]

.....

[W]hile it is without question that the Crown performs a special function in ensuring that justice is served and

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[39] *Boucher* v. *The Queen*, [1955] S.C.R. 16, 110 C.C.C. 263.

> cannot adopt a purely adversarial role towards the defence, [cites omitted] it is well recognized that the *adversarial process* is an important part of our judicial system and an accepted tool in our search for truth: see, for example, *R. v. Gruenke,* [1991] 3 S.C.R. 263 at 295, 67 C.C.C. (3d) 289 *per* L'Heureux-Dubé J. Nor should it be assumed that the Crown cannot act as a strong advocate within the adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability. Indeed, this is a critical element of this country's criminal law mechanism: [cites omitted]. In this sense, within the boundaries outlined above, the Crown must be allowed to perform the function with which it has been entrusted; discretion in pursuing justice remains an important part of that function. (*R. V. Cook*)[40] (Emphasis original.)
>
> .....
>
> In order to fulfil our responsibility as guardian of the public interest, we must be prepared to act as strong advocates. As quasi-judicial officers, however, our actions as advocates must be grounded in scrupulous fairness. This balancing between what has been called the quasi-judicial role of Crown counsel and our position as fearless adversaries in the criminal justice system is at the very heart of the proper functioning of our courts. It is one of the linchpins that creates or destroys public confidence in the justice system.

The Defence

It is trite to say that defence counsel do not assume the 'dual role' of Crown counsel. Their duty is to act as fearless, independent advocates on behalf of the accused. Subject only to their ethical and legal obligations, their duty is to their client, and to their client alone.

(iii) Conduct of the Defence

In his submissions at the conclusion of the evidentiary stage of the

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[40] *R. v. Cook* (1997), 114 C.C.C. (3d) 481 (S.C.C.) at 489.

Inquiry, Mr. Levy, on behalf of Mr. McGuigan and Mr. Smith, repeated his earlier requests that I consider the conduct of the defence at the second trial. He submitted that Jack Pinkofsky's manner of cross-examining witnesses, including the length of such examinations and his sometimes abusive attitude towards them, as well as his constant criticism of the prosecutors, alienated the jury towards Mr. Morin's defence. He suggested that the conduct of the defence should be seriously considered as an important factor in the wrongful conviction of Guy Paul Morin. As I reflected in Chapter I, he complained that while the Inquiry subjected the conduct of the prosecutors to intense scrutiny, there was very little scrutiny of the defence. In my view, the evidence demonstrates that this was not so.

During the submissions of Mr. Levy and Mr. Lockyer, reference was made to the fact that Mr. Pinkofsky was not called as a witness at the Inquiry. The record makes it clear that Commission counsel inquired of counsel for the parties at the Inquiry whether they were requesting that Mr. Pinkofsky be called as a witness at the Inquiry. If such a request were made, Commission counsel would consider it. Apparently no party requested he be him called. As Mr. Levy stated in his submissions in reply:

> Mr. Lockyer says he offered me the opportunity to examine Mr. Pinkofsky and I turned him down and that makes it, you know, it's my fault. Now why would I want to cross-examine Mr. Pinkofsky, Mr. Commissioner? Am I going to say to Mr. Pinkofsky, Mr. Pinkofsky, we've heard all sorts of witnesses here say you treated them abusively.
>
> What do you have to say to that Mr. Pinkofsky?' I know what Mr. Pinkofsky's answer is going to be ... I heard from the best evidence, the witnesses who were on the other end of Mr. Pinkofsky's cross-examination.

Although a great deal of evidence was called as to the conduct of Mr. Pinkofsky at the second trial, Mr. Pinkofsky did not apply for standing at the Inquiry, nor did he request that he be called as a witness. I did not consider it necessary to hear from him. What he said and did at the trial was fully revealed in the transcripts of evidence which were part of the Inquiry record (which my mandate permits me to consider) and in the evidence of witnesses who attended at the Inquiry.

In suggesting that the conduct of the defence be considered by me as a factor contributing to the wrongful conviction of Mr. Morin, Mr. Levy cited the testimony of a number of witnesses heard at the Inquiry. Thus, he referred to the evidence of Constable McGowan, who testified that when he was being cross-examined by Mr. Pinkofsky, he looked over at the jury and observed them slouching in their seats, hands on their faces, and gazing around the room. He said they appeared "as though they didn't want to be there." They didn't seem focused. At one point during a break, he went into the washroom and was met by a male member of the jury. The juror, according to McGowan, gave a big sigh of relief, indicating he was glad it was all over. The juror said that McGowan did "okay," and added that "Mr. Pinkofsky is really being an asshole."

Mr. Levy cited the evidence of Mr. Morin to the effect that the jury members eventually developed a distaste for Mr. Pinkofsky and, indirectly, for Mr. Morin. Mr. Morin agreed that he saw the trial judge's distaste for Mr. Pinkofsky. Mr. Scott, who had dealt with Mr. Pinkofsky previously, advised Susan MacLean how to deal with him in the light of his lengthy and contemptuous treatment of witnesses. He suggested that Ms. MacLean maintain her focus; it would be difficult. He told her Pinkofsky's cross-examinations could seem abusive.

Mr. Levy also pointed to the evidence of Brian Gover, who was counsel for the Crown at the pre-trial motions. He testified that Mr. Pinkofsky tended to take a sarcastic tone with witnesses which appeared to "batter" them. Mr. Gover agreed that Pinkofsky's approach might court the displeasure of the jury and that his demeanour and tactics might sorely test the trial judge's patience. Mr. Pinkofsky's nickname among the Crown attorneys was "The Prince of Darkness."

- Mrs. Pike felt that Pinkofsky was very condescending in his cross-examination of her;

- David Robertson grew to hate Pinkofsky due to his dealings with him;

- Detective Fitzpatrick said that a number of witnesses were upset at their treatment in the courtroom by Mr. Pinkofsky;

- Alex Smith testified that the cross-examination of some of the witnesses by Pinkofsky was abusive and vigorous; sometimes it was full of sarcasm;

- Susan MacLean swore that Pinkofsky's tone of voice when he questioned the witness Carruthers was mocking and sarcastic, and that the jury looked upset by it. One of the jurors was red in the face and had his fist clenched;

- Mr. McGuigan testified that Pinkofsky ridiculed and harassed some witnesses; he was vigorous and sarcastic. The jury were not pleased with the manner in which he conducted the case;

- Mr. Gover found Mr. Pinkofsky's manner of dealing with witnesses aggressive:

> I would say that Mr. Pinkofsky tended to take full advantage of the latitude that I'd extended to him in the questioning of witnesses, in confronting them with what they had written in the absence of exhaustion of their memories, and that he, in addition, especially with police officers, and some of the civilian witnesses, tended to take a sarcastic tone, and one which tended to batter the witnesses, in a sense.

In the light of this evidence Mr. Levy submitted that Mr. Pinkofsky's conduct of the case was detrimental to the defence, and it should not be ignored as a factor contributing to Mr. Morin's conviction.

Mr. Levy also pointed to tactical errors made by the defence team: they erred in leading the evidence of Ken Jessop as to his sexual relations with Christine because the jurors must have seen this as an insensitive tactic; they erred in calling the evidence of Sergeant Michalowsky, who came across as a pathetic and sick person. He also implied that Mr. Pinkofsky was not well advised to tender grocery receipts through Mr. Morin in support of his alibi; he said that those receipts damaged the alibi defence.

As I said in Chapter II, while discussing Ms. Nyznyk's evidence at the second trial, it may be that her lengthy cross- examination by counsel for Mr. Morin led the jury to believe that the hair and fibre comparisons demonstrated even more than Nyznyk claimed they did.

Mr. Gover gave evidence that, in effect, the defence alleged a conspiracy on the part of the police and the Crown to convict an innocent person; that can be a dangerous tactic. If it fails, the jury may turn against the false accuser. Mr. McGuigan alleged that there was a general attack on the integrity of the Crown pervading the trial through various cross-examinations during the Crown's case. However, Mr. Smith agreed that after hearing the evidence at the Inquiry, there was very little in front of the jury at the second trial on the issue of the integrity of the Crown. He said that during the private meetings with the defence team and during the stay and pre-trial motions, there was a great deal that apparently was said on behalf of the defence that led him to believe that the integrity of the prosecutors was very much in issue. He conceded that, perhaps, he did not divorce statements made before the jury from those made in its absence when he considered that issue.

On the other side of the ledger, there was evidence from Ms. MacLean that the prosecutors knew that Mr. Pinkofsky fought hard for his clients and would argue the admissibility of much of the evidence. They were aware that they might have to be very vigorous to ensure that the evidence was fairly and properly put before the jury. She implied that Pinkofsky was a strong opponent.

Mr. McGuigan testified that he had been involved in previous cases with Pinkofsky. He stated that Pinkofsky was a formidable opponent. No one works harder for his client. He works diligently. Accordingly, the prosecutors would be required to work very hard also. The idea was to 'outwork' him. He expected Mr. Pinkofsky's cross-examinations to be relentless and aggressive. He knows what the issues are, although the manner in which he gets to those issues is sometimes annoying. Mr. McGuigan further testified that Mr. Pinkofsky makes great use of the previous testimony of a witness that he is cross-examining. Accordingly, one has to take the time and make the effort to have the witnesses fully aware of what is contained in their previous testimony. Most Crown attorneys do not have the same degree of respect for Mr. Pinkofsky that Mr. McGuigan does. Pinkofsky left no stone unturned in the Morin trial.

Mr. McGuigan agreed that "any experienced prosecutor knows that he must prepare far more thoroughly for Mr. Pinkofsky than for any other opponent." He has great respect for Mr. Pinkofsky and he gets great results. Although he is not liked by some of McGuigan's fellow Crown attorneys, he respects him and enjoys having a trial with him: "You know its going to be tough, but he brings out the best in you, in my opinion."

After Guy Paul Morin's exoneration on January 23, 1995, Mr. McGuigan stated at a press conference that "the accused at his second trial was represented by an extremely competent, dedicated and experienced counsel — Mr. Jack Pinkofsky." He adopted that statement in his testimony at the Inquiry. He took no joy in criticizing Pinkofsky, but did so because the issue as to the conduct of the defence was raised at the Inquiry. He reflected his view that certain tactical decisions by Mr. Pinkofsky, including the approach to Crown witnesses, may not have been the best in the circumstances and may have contributed to the jury's verdict. He said that he did not share the less charitable view of Mr. Pinkofsky held by some other prosecutors.

Mr. Gover recalled Mr. McGuigan's view of Mr. Pinkofsky, as stated to him:

> Mr. McGuigan made it plain that Mr. Pinkofsky was a very formidable adversary, who was dogged in his defence of his clients, and I recall a turn of phrase that Mr. McGuigan used; he said, "Jack has all the tools," meaning that Jack had all of the forensic ability to fully defend Mr. Morin.

Mr. Gover further testified at the Inquiry:

> I have a lot of respect for Jack Pinkofsky. I felt Jack did his utmost to put on the record every allegation of professional misconduct, and he did his level best to make them out ... occasionally Mr. Pinkofsky would lose his focus, and what perhaps were some of his better arguments were lost in the shuffle ... He marshalled [the facts] well, but became indiscriminate in the manner in which he used them.

Mr. Gover also said that, "from an early juncture in the motion, Mr.

Pinkofsky alluded to the prospect of a commission of inquiry when the case was over." Undoubtedly, Mr. Pinkofsky's judgment in this respect was accurate. Mr. Gover sensed during his involvement in the trial that Mr. Pinkofsky was not merely posturing regarding Morin's innocence; he had a genuine belief in his innocence. Mr. Morin told the Inquiry that Pinkofsky had that belief. As subsequent events have disclosed, Mr. Pinkofsky's intuition was accurate in this respect also.

Mr. Morin told the Inquiry that he felt that Mr. Pinkofsky and his other counsel at the second trial were professional, loyal, industrious and indefatigable. He said his lawyers were "phenomenal." He found Mr. Pinkofsky to be personable, like a 'father' to him. He was a dogged lawyer who brought all his skills to his defence. He appeared to have no serious complaints about the manner in which he was defended despite the fact that he was outraged that he was found guilty of a murder that he did not commit. He was grateful for the efforts of his lawyers. He did not feel that Mr. Pinkofsky or his other counsel were in any way responsible for his conviction.

I find it noteworthy that among the many grounds of appeal set out in Mr. Morin's Notice of Appeal, none suggested that he was incompetently or inadequately represented at trial. Mr. Levy alleged that Mr. Lockyer and JoAnne McLean would not be expected to level criticism at this Inquiry of the conduct of the defence at the second trial. He pointed out that Mr. Lockyer is Mr. Pinkofsky's partner and that Ms. MacLean was part of the defence team at that trial. Undoubtedly, he could advance the same argument as to why Morin's Notice of Appeal raised no complaint as to the conduct of the defence at his trial. However, I find it more compelling that Mr. Morin chose to retain Mr. Lockyer and Ms. MacLean as his counsel on appeal (and at this Inquiry) despite their prior relationships to Mr. Pinkofsky and to the trial. It is, perhaps, trite to observe that Mr. Morin probably had a wide choice of counsel to represent his interests at both proceedings. His choice reflects his satisfaction with his trial representation.

Findings

Having regard to all the evidence, to the submissions which have been made to me, and the considerations which I have outlined, I have concluded that some tactical decisions taken by the defence at Mr. Morin's second trial

were not the best, and it may be argued that they adversely affected the jury. However, some of the forensic skills demonstrated at that trial were exceptional. Unlike the situation in a number of the notorious cases of wrongful convictions cited by some of the systemic witnesses, I do not see this as a case of defence incompetence, neglect or misconduct. Any criticisms of Mr. Pinkofsky are idiosyncratic to his style and approach and are not reflective of systemic issues or to be addressed by any systemic recommendations I may make.

The conduct of the defence was also relevant in two other ways. First, it was alleged that the cross-examinations conducted by Mr. Pinkofsky of various witnesses in the first months of the trial explain, in part, why Mr. McGuigan was moved to make 'the offer' to the jailhouse informants. I rejected that explanation in Chapter III, for the reasons earlier provided. Second, Mr. Pinkofsky's approach to trials is relevant to the approach taken in response by Crown counsel during the currency of the second trial. For example, the defence approach to the second trial is relevant to certain actions or attitudes of the prosecutors. This relevance is discussed in the context of specific issues.

(iii) Relevance of the Insanity Defence

During the first trial, after calling evidence of Mr. Morin's alibi, Mr. Ruby applied to Mr. Justice Craig for a bifurcated trial in order that the 'defence of insanity' could be raised, should the jury find Mr. Morin guilty. The application was unsuccessful.[41]

Mr. Ruby then adduced opinion evidence on Mr. Morin's mental health from Dr. Graham Turrall, a psychologist who had spent approximately 14 hours with him administering numerous tests, and Dr. Basil Orchard, a psychiatrist who had examined Mr. Morin for approximately 5 to 6 hours. The conclusion of both witnesses was that Mr. Morin suffered from simple schizophrenia, a major mental illness characterized by a thinking disorder that affected the way he communicated with others. In Dr. Orchard's opinion, Mr. Morin's illness was "moderately severe" and in an advanced state.

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[41] The approach advocated by Mr. Ruby has since become the law: *R. v. Swain* (1991), 63 C.C.C.(3d) 481 (S.C.C.).

Dr. Turrall testified that Mr. Morin felt alienated, misunderstood, and that he was socially very introverted; he could be secretive and a day-dreamer, having unrealistic attitudes about himself and others, with abnormal, bizarre, and illogical thinking. Dr. Turrall described the disease as one which could affect

> [h]is interpersonal relations and his ability to deal with reality testing. Reality testing being defined as the ability to distinguish what is real from what is not real.

Dealing specifically with Mr. Morin's speech, Dr. Turrall testified that he was very awkward and lacked spontaneity. He was said to have presented the psychologist with illogical ideas, talking to him about "little girls growing up to be corrupt women" and the 'split brains of monks'. Dr. Turrall had observed Mr. Morin's cross-examination by John Scott. In his opinion, while Mr. Morin could deal with narrowly focused questions, when questions were not so structured, he could not keep his mind on track. His propensity for tangential thinking and inappropriate affect, such as smiling when Christine Jessop was discussed, was a characteristic symptom of schizophrenia.

During this psychiatric evidence the experts were questioned on the hypothetical mental state of Mr. Morin *if* he had killed Christine Jessop. Assuming that Mr. Morin had killed Christine Jessop, the jury was told that he would have been in an acute psychotic state and unable to appreciate that by stabbing her he was causing her death.

Dr. Turrall testified:

> [A]ssuming Mr. Morin [committed the murder] it would be my opinion that he would be in a primitive form of thinking disorder characterized as primary process thinking in which something, some stress, some acute confusional state had transpired where he perceived rejection.
>
> .....
>
> He could, in fact, take Christine's life thinking in a reality that is out of this world that, in fact, when he was taking her life or stabbing her that, in fact, he might be giving her life, preserving her innocence in

> some strange illogical bizarre form of thought.
>
> .....
>
> I would like to stress that in Mr. Morin's mind the act of stabbing may have represented to him a magic wand with which he was touching her and giving her life.
>
> .....
>
> For Mr. Morin, at that particular point [driving a car] he may have been thinking and feeling that he was on a magic carpet.

According to Dr. Turrall, statistics indicate that one percent of the population has been diagnosed and hospitalized with a major mental illness, schizophrenia being the primary one, at some point in their lives.

Both Drs. Turrall and Orchard expressed the opinion that through defence mechanisms Mr. Morin would be able to block the incident out of his mind.

During cross-examination by Mr. Scott Dr. Orchard was asked whether Mr. Morin had the capacity to rape and repeatedly stab a nine year-old girl:

> Q. I take it by the very fact that you are capable of expressing an opinion on what condition this man would be in, in the event that he sexually assaulted — raped and stabbed many times Christine Jessop, that you must be of the opinion that he has the psychological make-up to commit such an offence.
>
> A. No, I am of the opinion that, in fact, the illness — and if he did that — did disturb his psychological make-up so that he could do such an act.
>
> His Lordship: Excuse me. I didn't get that. Your answer was "No..." what, Doctor?
>
> The Witness: No. The illness very likely did — could have or very likely did disturb his psychological make-up to the point that he could commit such an offence. I didn't feel that he had necessarily the psychological

make-up to molest children.

.....

Q. Coming back to where we started about capacity and your responses to certain hypotheticals, I am suggesting to you the man sitting there, on what you have told us in this Court, is a man that has mental problems, who is capable of raping and of stabbing multiply an individual. Isn't that correct?

A. He is capable of forcing intercourse and stabbing multiply a person if he did that, yes, he is capable of it.

Q. With a 40 pound girl, a nine year old.

A. Yes.

Q. Now, you talked of schizophrenia. I suggest to you that the broad range of schizophrenics would not be so capable, would they?

A. Well, the majority of people with schizophrenia don't get into violent behaviour, but some of them do. So the majority of cases of schizophrenia would not be involved in this kind of behaviour. The point is I don't know whether he was involved in the behaviour or not, but I do know about the illness.

Q. You know that this illness is such that it would permit him to do that to that nine year old, don't you?

A. Yes.

Q. And I am suggesting to you that the number who could do that to a nine year-old is minuscule.

A. That is true.

Q. That this man is something special, isn't he?

A. Yes. It is not a usual kind of thing, not a common kind of thing, so yes, in that way it is unusual.

Q. It could only be an offence committed by a member of an abnormal group. Isn't that correct?

A. Well, almost, at any rate. I never say 'only' or 'never' or 'always' because that's when I'm wrong, but I would say in the vast, vast majority of cases, such an offence would likely be committed by somebody who had some sort of pretty strong abnormality; a serious abnormality.

Q. Are not the psychiatric disorders that you are describing that this man has, similar to what you would expect to find in terms of the scene that has unfolded before you on Exhibit 8, an isolated area, sexual assault of a nine year-old left with her clothes askew, stabbed many times?

A. Yes, certainly. I don't know – first of all, sexual assault of a nine year old, if it was attempting to force intercourse, would be pretty unusual because that is not a thing that a nine year old is usually attractive for. They usually are not developed to the point that they are usual sexual objects. Stabbed many times is often a sign that there is something strange going on. If somebody wants to kill somebody they can usually do it without doing it many times. They can usually manage not to sort of continue on in the activity.

Q. This is a sign of disorganization, isn't it?

A. Yes it is.

Q. Multiple stab wounds on the chest and back are clearly an indication of a very disorganized crime aren't they?

A. Yes.

.....

A. I don't know that I am surprised that he denied it. I just say that when someone is able to take me through their memory and their mental processes about a certain time, then I can draw a conclusion from that. When a person does not have that available, then I can't draw conclusions from what he tells me about the incident or about the particular time. I have to draw conclusions from my diagnosis. That is what the difficulty is, you see. I don't know; I have nothing in my interviews

> with him that I could say, "Ah, yes, he did this", but I did have an illness. Whether he did it or not, that is up to somebody else to decide, that is not for me because I have nothing that can add to that one way or the other, except that there is this illness.
>
> Q. I agree with you, you can't, but I suggest you can add two features which you have added, that this man would be totally capable of denying the crime, repressing the truth, standing where you are standing, and say "I didn't do it." Isn't that correct?
>
> A. Yes.
>
> Q. And the second thing you can add is that in your opinion that man is the type of man who could commit this crime.
>
> A. Yes. That is possible with this illness, that happens with this illness.
>
> Q. That is very helpful, isn't it sir, in terms of assessing a situation?
>
> A. Whoever hears it will have to decide whether that is helpful.
>
> Q. Then you went a third step and indicated – I think you've indicated that there would be a very small, small area of the population that could be capable of such a crime, didn't you?
>
> A. It's not a common thing.

Following Mr. Morin's acquittal at his first trial, the Supreme Court of Canada, in considering the psychiatric evidence and the trial judge's charge to the jury, concluded that the trial judge did not err in ruling that the psychiatric evidence was not admissible as proof that Guy Paul Morin did, in fact, kill Christine Jessop. Sopinka J. stated:

> The evidence of Dr. Orchard referred to above amounts to no more than this. The appellant is a simple schizophrenic. A small percentage of simple schizophrenics have the tendency or capability of committing the crime in question in the abnormal

> fashion in which it was committed. There is no evidence that the appellant has these tendencies or capability unless one assumes, as Dr. Orchard was asked to do, that the appellant committed the crime. Accordingly, the learned trial judge was right when he ruled that the evidence was not admissible as proof that the appellant did, in fact, kill Christine Jessop. There was, therefore, no error at trial in this respect.[42]

No psychiatric evidence was tendered by the defence at the second trial. The exclusive defence advanced on behalf of Guy Paul Morin was that he did not commit the crime. Indeed, he did not.

On Mr. Morin's application for bail pending his re-trial, Dr. Orchard, who had continued to see Mr. Morin professionally, since his acquittal, prepared an affidavit reflecting upon Mr. Morin's state of health. In his affidavit of November 11, 1992 he stated:

> At Mr. Morin's first trial, I was also asked to express an opinion on the issue of insanity under section 16 of the Criminal Code. This issue was addressed solely on the basis of a hypothetical question that included as its necessary premise an *assumption* that Mr. Morin did in fact kill Christine Jessop. Indeed, at that time and ever since, Mr. Morin has consistently asserted his innocence to me and has always denied any involvement in the disappearance and death of Christine Jessop. Based solely on the hypothetical question, I expressed the opinion that if Mr. Morin had committed the offence, he would very likely have been in a psychotic state in which he would not appreciate the nature and quality of his act. Further, I testified that Mr. Morin's belief that he did not commit the crime, *if* in fact he had committed it, would have to be the result of massive repression which precluded him from having access to any recollection of these events.
>
> *In my assessment of Mr. Morin, there was no evidence of the existence of such a psychotic break or such massive repression.*
>
> .....

---

[42] *Morin* v. *The Queen* (1988), 44 CCC (3d) 193 (SCC) at 218.

> Prior to Guy Paul Morin returning to custody in June of 1987 when the Ontario Court of Appeal overturned his acquittal, I had occasion to see Mr. Morin a couple of times at his request for general supportive therapy. After his detention and his release on bail in June, 1987, I saw Mr. Morin regularly. I initially saw him once a week and then in the later stages, once every two weeks.
>
> This continued from 1987 until June, 1990 when Mr. Morin's second trial commenced.
>
> .....
>
> During the period of time that I have seen Mr. Morin, I have formed the opinion that Mr. Morin does not require medication. *He does not present any psychiatric risk to himself or to others* so that I have not, at any time, prescribed medication for him.
>
> Throughout the years 1987 through to 1990, my opinion has remained unchanged: that Mr. Morin suffers from simple schizophrenia but this illness is not at present so severe as to interfere with his thoughts, emotions, activities or his life in general.
>
> During the years that I have had contact with Mr. Morin, there have been occasions, largely as a result of further appeals or the anticipation of the commencement of his trial, when he has faced substantial stress. *Despite this stress, I have not observed any decompensation by him nor have I observed any psychotic behaviour. If a psychotic break had occurred and Mr. Morin had massively repressed the behaviour associated with this episode, it is my opinion that I would most likely have observed evidence of this during our sessions. It is further my opinion that if in fact Mr. Morin had ever suffered a psychotic break in the past, there would be an increased likelihood of observing decompensation again. This I have not seen. Although this does not alter the initial diagnosis, it does speak to the improbability that Mr. Morin ever experienced such an event in the first place.* (Emphasis added.)

Several parties sought to explore the factual and systemic issues

arising out of the 'insanity defence,' at this Inquiry. In Chapter I, I outlined my relevant rulings on this point and it is unnecessary to repeat my reasoning in any detail here. Simply put, I decided that I would not explore whether the psychiatric and psychological evidence was valid or invalid, and whether this evidence should or should not have been tendered by the defence at the first trial. These issues had limited relevance to my mandate, since the 'insanity' evidence was not heard by the jury that convicted Guy Paul Morin, and the tactical decision to call this evidence during the trial proper has no systemic interest, given the change in the law. I also had no doubt that the exploration of these issues, undoubtedly intriguing, would be extremely time-consuming. However, counsel for police and prosecutors made clear that the presentation of the alternative 'defence of insanity' at the first trial, and the evidence in its support, affected their state of mind and must be considered by me on that basis. I agreed. Accordingly, I have summarized the above evidence because it is relevant to the investigators' and prosecutors' state of mind. The relevance of this evidence does not depend upon its validity. Its recitation is undoubtedly painful to Mr. Morin who, it is clear from his counsel's comments at the Inquiry, does not adopt it in any way. The Supreme Court of Canada held that, even taking the evidence at its highest, it did not make it more likely that Guy Paul Morin committed the crime; the critical expert evidence was based upon the *assumption* that he committed the crime.

(iv) The Outlook of the Crowns, and the Effect of the Insanity Defence

Mr. Gover told this Inquiry that he "saw strong indications of tunnel vision from time to time" on the part of both the investigators and the prosecution. In his view, the tunnel vision of the prosecutors should be viewed in the context that

> they were prosecuting a case where the defence had included what I have described as the implicit admission that Mr. Morin had committed the act.

When asked for his opinion as to what had led to the wrongful conviction of Mr. Morin, Mr. Gover cited various things, elsewhere noted, including this:

> I think, as well, that what went wrong includes the defence ... by Mr. Morin at his first trial. A defence which included the implicit acknowledgment that he

> had committed the deed, resulting in the death of Christine Jessop. And that, I think, constituted substantial confirmation of the view that the investigators and prosecutors were pursuing the right man.

Brian Gover's view was that the psychiatric evidence led by the defence at the first trial went beyond merely explaining Mr. Morin's unusual conduct and some of the unusual things said by him to Sergeant Hobbs and Mr. May in the jail cell, and to others:

> By leading evidence of insanity, Mr. Ruby, in my view was conveying the message that he didn't believe the alibi. So, you know, he went well beyond leading some psychiatric evidence to explain away the conduct of Mr. Morin.

Apparently the jury did not feel similarly since they acquitted Mr. Morin after hearing the evidence. As Mr. Gover commented in part:

> A. I think that history has borne out the fact that the psychiatric evidence led at the first trial was ... not worthy of belief.
>
> Q. A crock; is that the vernacular?
>
> A. Yes.
>
> Q. Yes. So what you're saying, so I understand that, your view is that the evidence given by the psychiatrists, both Crown and defence at the first trial, was just nonsense?
>
> A. That's the view that I've come to take, and in part, it's based on the way Mr. Morin has conducted himself while at large awaiting trial, while on trial, and since his trial, and since being acquitted by the Court of Appeal.

In this context, I reiterate my earlier comments. Drs. Turrall and Orchard are not parties before this Inquiry. Mr. Gover's evidence is not relied upon by me for the accuracy of his assessment, but rather to reflect the state of mind of the prosecutors who were aware of it.

Mr. Gover told the Inquiry of his belief that Ms. MacLean was "utterly convinced that Mr. Morin was the perpetrator of this horrific offence."

Ms. MacLean said that her belief in Mr. Morin's guilt was influenced, in part, by the psychological and psychiatric evidence at Mr. Morin's first trial wherein:

- Mr. Morin had told Dr. Turrall that, like a monk, he was able to compartmentalize his bad thoughts and only access them when necessary. In Ms. MacLean's opinion, this evidence corroborated Sergeant Hobbs' evidence of discussions he had with Mr. Morin, and lent more credibility to his claim that he had received a confession from him;

- Mr. Morin told the psychologist that little girls grew up to be corrupt. This served to confirm in Ms. MacLean's mind the statement that he had made to Inspector Shephard in the unrecorded portion of the February 22, 1985 interview;

- Mr. Morin's masturbation habits were discussed which led prosecutors to believe that, in addition to having schizophrenia, he may be sexually dysfunctional;

- It was Dr. Turrall's opinion that Mr. Morin was an angry member of a pathological family, the members of which were secretive and defensive in nature;

- Dr. Orchard had testified that Mr. Morin was capable of committing the crime and then suppressing it.

Ms. MacLean said that, until the insanity defence was called, there was nothing to suggest to the prosecutors that Mr. Morin, who appeared to be a quiet, private person and an accomplished musician, had the psychiatric make-up to commit the crime.

In addition to the evidence of Mr. Morin's psychological make-up, Ms. MacLean also relied on her strong belief in the hair and fibre evidence, proven mistakes in aspects of the alibi that Mr. Morin put forward in the second trial, the alleged confession made to May, Sergeant Hobbs' evidence that Mr. Morin had confessed to him, together with the Hobbs/Morin taped conversations. During the Inquiry, Ms. MacLean was obviously anguished over her role in Mr. Morin's conviction and provided Mr. Morin with a heartfelt apology for any part she played in his conviction.

In Mr. McGuigan's view, the insanity defence at the first trial indicated that Mr. Morin had admitted to Mr. Ruby that he had committed the offence or, alternatively, that Mr. Ruby was convinced of his guilt or felt he would be found guilty. In addition to the psychiatric evidence, Mr. McGuigan said that the other factors convinced him of Mr. Morin's guilt, including:

- Mr. Morin's refusal to take a polygraph upon his arrest;

- Sergeant Hobbs' evidence that in response to his question "What do you do for your frustrations?", Morin replied, "I redrum the innocent" ('murder' - spelled backwards);

- Morin's comment to Sergeant Hobbs that no one was aware of the real relationship he and Christine Jessop had;

- Sergeant Hobbs' evidence that, in response to his question to Mr. Morin "How was your's [murder] done?", Mr. Morin made stabbing motions towards the chest;

- Mr. Morin's failure to search for Christine, his failure to offer condolences to the family or attend her funeral;

- Mr. Morin's comment to Mandy Patterson that she was murdered the night she was taken, showing exclusive knowledge of the killer.

During the Inquiry, Mr. McGuigan expressed his current belief that Mr. Morin is innocent. On January 23, 1995, at a press conference, he made the following public statement, which he adopted in his evidence before the Commission:

> My name is Leo McGuigan. I was the lead Crown counsel on the second trial in which Guy Paul Morin was convicted by a jury of first-degree murder. It would be inhuman for me not to acknowledge the hardship to Guy Paul Morin, his parents and family, that this prosecution has caused.
>
> It has extracted a huge toll on Mr. Morin's family, and I join in expressing my regret to them. I would be extremely remiss if I did not acknowledge the anguish that these developments have caused the victims. The Jessop family has been forced to endure the brutal murder of their nine year-old daughter, Christine, in two lengthy trials. Now at a time when I'm sure they were attempting to get on with their lives, all that pain has been revived. I feel great sorrow for them.

The position set out in the submissions of counsel for the Morins is that, despite Mr. McGuigan's apology, his confrontational position at the Inquiry rendered his apology "a hollow one." In support of this proposition, the submission cites the following incidents:

- Placing the responsibility for Mr. Morin's wrongful conviction squarely on Mr. Pinkofsky's conduct of the defence;

- Blaming Guy Paul himself on the grounds that he committed perjury by denying that he confessed to May and Mr. X and in presenting a false alibi at both trials;

- Blaming Alphonse (and perhaps Ida) Morin for committing perjury by supporting Guy Paul's false alibi;

- Amassing lists during his evidence indicating that

> Morin made numerous incriminating remarks in his conversations with Shephard and Fitzpatrick on April 22nd;

During the Inquiry, Mr. McGuigan was asked whether his critical assessment of evidence may have been skewed, albeit unconsciously, by a strong belief in Mr. Morin's guilt. He acknowledged this possibility and the inherent difficulty in evaluating the effect of one's belief in guilt:

> Q. I want to ask you whether you think, with the benefit of hindsight, that perhaps your critical assessment of this kind of evidence, for example, and we'll deal with some of the other people down the road. Paddy Hester and others might have been skewed, unconsciously, by your strong view in Guy Paul Morin's guilt. Do you think that could have happened?
>
> A. Well, you know, I suppose everything's possible. I would hope that that's not true. I tried to look at this as what would I do if I was the defence counsel and I think that helps you to keep somewhat of an open mind. But, you know, I don't know how everyone's mind works and I probably don't even know how mine works.
>
> But I would hope that that's not the situation, but I guess there is human nature and what effect that has on someone is, subconsciously, is hard to evaluate. But I would really hope that's not the situation.

Mr. Gover told the Inquiry:

> Q [S]peaking of my own approach to the case, going into it, I was convinced that this was the right man who was occupying the prisoner's dock.
>
> A. Yes.
>
> Q. Because of the psychiatric evidence which included the admission from either Doctor Orchard or Doctor Turrall in cross-examination that Mr. Morin was one, a member of a minuscule percentage of the population capable of committing this horrendous offence.

.....

> *In my involvement in the motion, I came to doubt whether we had the right man.* (Emphasis added.)

Later in his evidence, he said:

> I had misgivings about the case, and I believe I've explained the view that I took of the case revolving as it did around the psychiatric evidence led at the first trial. And by the end of the case — in my involvement in the case, rather, I came to the view that Mr. Morin had perpetrated the deed, but that he had done so in a condition such that he would have a defence under Section 16 of the Criminal Code.

March 22, 1991 Tactical Meeting: Approach to Pinkofsky

After the order directing a re-trial was affirmed by the Supreme Court of Canada, the Crown was notified that Mr. Pinkofsky and Ms. Widner would represent Mr. Morin at his second trial.

Ms. MacLean and Mr. McGuigan testified that between February 1991 (the date the application for a stay of proceedings was dismissed) and April 1991 (the commencement of the pre-trial motions on the admissibility of evidence) a meeting of senior Crown attorneys was arranged by Mr. McGuigan to discuss how certain issues should be approached.

The Agenda for the March 22, 1991 meeting

Ms. MacLean said that Mr. McGuigan asked her to prepare an agenda for the meeting for advance distribution to senior Crown attorneys asked to attend. Mr. McGuigan's recollection was that there was no agenda for the meeting.[43]

Ms. MacLean testified that the agenda was discussed amongst Mr.

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[43] He did, however, recall that he prepared a chart of the issues or problems in the trial and the legal principles which would emerge. He took these notes to the March 22, 1991 meeting but they were not used and were subsequently discarded.

McGuigan, Mr. Smith and Ms. MacLean, but she could not recall to what extent. Ms. MacLean's notes outlining her agenda read, in part:

> 1. Tactical advice regarding Pinkofsky's approach of attempting to confuse the jury and blame others, specifically:
> a) other "suspects";
> b) sightings of Christine Jessop;
> c) sightings of suspicious vehicles.[44]
>
> 2. How do we deal with Pinkofsky's general approach to a trial.
> a) leading inadmissible evidence;
> b) failing to obey rulings of the trial judge;
> c) failing to follow procedural rules such as the [Canada Evidence Act], s. 9(2) applications. [cross examination of one's own witness]
> d) misstating evidence, especially during cross-examination.

Ms. MacLean told the Inquiry that while the stay proceedings had provided her with some insight as to Mr. Pinkofsky's style of defence, the views expressed in the agenda would have emanated from other Crown attorneys who had opposed Mr. Pinkofsky in a trial setting. Both Mr. McGuigan and Mr. Scott had trial experience with Mr. Pinkofsky. Scott had shared with her his views as to Mr. Pinkofsky's general approach to trials and she may have contributed to the formulation of the agenda on the basis of those discussions.

Mr. McGuigan described the March 22, 1991 meeting as a discussion of how to proceed with various issues he and his co-counsel believed would arise in the case. Mr. McGuigan's recollection was that the meeting took place at the Whitby Police Station, although it may have been at the Oshawa station.

Who was Present

Ms. MacLean and Mr. McGuigan who attended the 6 ½ hour meeting recalled the presence of several other Crown attorneys, including Mr. Smith,

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[44] Although she could not recall specific discussions, Ms. MacLean related a concern on the part of those formulating the agenda that these matters and the issue of other suspects might be raised by the defence in a manner which may confuse the jury. The Crown perspective was that these issues should be raised only where rulings permitted and presented in a manner which could be properly responded to.

Mr. Scott, Chris Meinhart, Larry Owen, and David Thompson. Neither Mr. McGuigan nor Ms. MacLean were sure whether Paul Culver was present.

Some of the lawyers present had substantial legal precedent files which were identified for future reference. Mr. McGuigan could not specifically recall a discussion as to Mr. Pinkofsky's particular style of defence, but said that it may well have been discussed by Mr. Scott or by him or by some of the others who had dealt with him previously.

Was it a "War"?

Ms. MacLean's notes taken during the meeting included the following reference in connection with other suspects:

> Fight him every inch of the way - object to relevance, make him call witnesses, don't let him file occurrence reports.

Ms. MacLean could not recall who made this comment but stated that it was not she. She explained the underlying concern that the rules of evidence would not be complied with if the issue of other suspects was raised.

Ms. MacLean was asked if the note reflected that this trial was gearing up to be a 'war.' In reply, she referred to a perception on the part of Crown counsel which emerged in about April 1990[45] that the defence would involve a personal attack on the integrity of all four Crown counsel (including Mr. Scott) and the two lead investigators in the case. As to whether the note reflected an appropriate style of prosecution, Ms. MacLean indicated that Crown counsel knew that Mr. Pinkofsky fought hard for his clients and would argue the admissibility of much of the evidence. She explained that it may be necessary to 'fight' to ensure that evidence was dealt with fairly and that only proper evidence was placed before the jury.

Ms. MacLean said that her primary duty was owed to the community to present evidence fairly and to prosecute vigorously. She testified that a

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[45] Commencing with a complaint to the Regional Director by the defence against John Scott.

vigorous defence and a vigorous prosecution does not lead to injustice; the fact of Mr. Morin's innocence does not mean the conduct of counsel contributed to his wrongful conviction. She added:

> [I]f you believe that a defence lawyer will be attacking your integrity ... it's a very difficult issue as to how to appropriately respond. ... Most of the lawyers I deal with do not use the style that Mr. Pinkofsky had, which is to suggest a broad-based conspiracy amongst all members of the administration of justice. ...[T]he local Bar in Durham doesn't have that style, and other counsel from Toronto who come out don't have that style. ... [I]n my view, it's a very unfortunate style of defence, because it ... does pit the Crown and the defence against one another more than I think is necessary.

The following reference to Donald Marshall's case is contained within the notes of the March 22, 1991 meeting:

> Re Donald Marshall. a) May be raised during objections or closing argument. b) How do we object? Relevance?
> 1. talk about reasonable doubt.
> 2. Talk about duty of jury, look at the evidence and decide on that basis.
> 3. Does this mean no jury can ever convict in light of Marshall?
> 4. Marshall was an important inquiry to protect all of our rights. Should we let Morin ride on Marshall's coattails, "me too, me too". Isn't his own defence good enough? This approach is calculated to mislead you into conjuring in your minds a fanciful doubt, not a real doubt. Are we going to let Marshall be used to let a rapist murderer of nine-year-old girls off?

In explaining these notes, Ms. MacLean reflected the concern that the defence may improperly attempt to inject the results of the Marshall case into the Morin proceedings, thereby creating a risk that the jury would be fearful of performing its sworn duty — the performance of which may involve convicting Mr. Morin.

While Mr. McGuigan recalled the Donald Marshall case being

discussed, he had some doubt that there was a discussion as to whether Morin should be allowed to 'ride on Marshall's coattails.' However, he had no definite recollection one way or another.

How to deal with the defence raising other suspects

MacLean's evidence was that while there was nothing wrong with the defence raising the issue of other suspects, Crown counsel wished to ensure that, if raised, it was in accordance with the rules of evidence. She stated that the following notes of the March 22nd meeting reflect this concern:

> Suspects
> 1. how does defence introduce this evidence? Through cross-examination.
> - can he cross-examine the police on these points. What is the relevance?
> - sightings of Christine Jessop
> - will argue police targeted Morin and ignored other suspects - he'll say look at all these investigative avenues that were not explored.

MacLean testified that possible responses to the issue of other suspects being raised by the defence, included the question of whether evidence could be called to show that the police had cleared suspects by the use of polygraphs. These issues were discussed during the meeting:

> - can call the "suspects" to say they didn't do it.
>
> - call evidence to clear those suspects.
>
> .....
>
> - the polygraph is a widespread, accepted method of eliminating a suspect.
>
> - officers should be instructed to say: "and I took one other step...."
> - then object, get the jury out, and argue the admissibility of the reference to the polygraph.

Ms. MacLean explained that the above note refers to instructions to officers not to mention the polygraph in relation to other suspects. The concern was that inadvertence, in this regard, may lead to a mistrial. Rather,

officers were told to use a phrase like "And I took another step" as a cue to litigate the issue before the trial judge. Mr. McGuigan could not recall this discussion. The notes also contain the following reference:

> b) object as to relevance - make defence specifically articulate grounds - if bias - what are specific allegations re: bias.
> c) put defence to strict proof

Ms. MacLean addressed the necessity of knowing the grounds on which the issue of other suspects would be raised. While this area was open to the defence on the basis of an argument that the police were biased in the investigation of Mr. Morin, the issue of bias was not, in fact, raised by the defence. The trial judge ruled the evidence inadmissible in that there was an insufficient connection with other suspects.

The note also reflects a concern with potential hearsay.

> PROCEDURE
> 1. Re other suspects
> a) Object as being hearsay evidence.

Another reference in Ms. MacLean's notes related to cross-examination of an officer on information received by that officer. Ms. MacLean explained that in the course of the motion on admissibility, an undertaking would be sought that the suggestion be supported by subsequently calling the evidence:

> d) make defence undertake to call evidence in support of his allegations, the best evidence rule.
>
> .....
>
> If defence can ask officers about hearsay evidence,
> 1. prepare officers to articulate why suspects eliminated.
> 2. Have officers prepared to indicate why Morin was a better suspect (comparison)
> - Evaluation of evidence against Morin compared to other suspects.

"Don't let Jack cuddle up"

Ms. MacLean's notes of the March 22nd meeting also contain the following entry under the heading "General Approach to Trial":

> Don't let Jack cuddle up to you and chat to you during the trial

Ms. MacLean stated that the meaning of this suggestion, made by one of the other counsel present, was that witnesses should be advised that although Mr. Pinkofsky may engage in a friendly conversation in the hallway, nothing was off the record and that what was said to Mr. Pinkofsky may be put to them in the witness stand.

Findings

I accept that John Scott, Leo McGuigan, Alex Smith and Susan MacLean wholeheartedly believed, throughout their involvement in the Guy Paul Morin proceedings, that Mr. Morin was guilty of the offence with which he was charged. This does not appear to have been in issue at this Inquiry. John Scott and Susan MacLean, Crown counsel at the first trial, believed that Mr. Morin was guilty prior to any knowledge that the alternative insanity defence would be raised. Accordingly, the insanity defence did not change their views, but I accept that they saw it as confirmation of what they already knew (or thought they knew). I also accept that Mr. McGuigan and Mr. Smith, who came to the case after the insanity defence had been raised at the first trial, were affected by it in a similar way. This was not unreasonable — the 'insanity evidence,' carefully scrutinized, may not have made Mr. Morin's guilt more likely, but the fact that such a defence would even be advanced had to impress itself on most anybody.

The prosecutors at the second trial also drew upon other evidence — such as that of Officer Hobbs — to support their firm view that Guy Paul Morin was guilty. All of this is perfectly understandable.

It is also understandable that this belief would affect the prosecutors' assessment of their own evidence and the evidence tendered by the defence. Their failing was that this belief so pervaded their thinking that they were unable, at times, to objectively view the evidence, and incapable at times to

be at all introspective about the very serious reliability problems with a number of their own witnesses. As I have said earlier, their relationship with the police, at times, blinded them to the very serious reliability problems with their own officers.

Brian Gover was intimately familiar with much of the Crown's case. He was a prosecutor. He was an effective advocate. He understood perfectly the adversarial system. But he was able to view the Crown's evidence with some objectivity. He recognized the serious, perhaps fatal, problems with the credibility and reliability of some of the evidence to be led by the Crown. I believe that, had he prosecuted Mr. Morin, he would not have called some of the evidence presented by the Crown at the second trial — not because he was legally disentitled from so doing, but rather in the exercise of sound prosecutorial discretion. I accept that John Scott did not call evidence at the first trial in the exercise of prosecutorial discretion — Leslie Chipman was one example.

These findings mirror those which I earlier made in the context of the prosecutors' assessment of Constable Robertson's evidence.

(v) The Incident Concerning Michael Brian Joll

Michael Brian Joll was a member of the Peel Regional Police force from 1977 to 1990. He testified that in 1985 he joined the Youth Bureau of that force, where he served for two years. In 1990 he left the force to join an organization known as "Pointts," a paralegal firm that defends people in traffic courts.

He gave evidence before the Inquiry that in or about the summer of 1986 he attended a lecture for members of the Peel force given by the Peel Regional Crown attorneys in the basement conference room at 12 Division at 4600 Dixie Road in Mississauga. There were 30 or 40 persons there, including both uniformed and plainclothes officers. Four or five Crown attorneys presented lectures; they were introduced by Leo McGuigan.

Mr. Joll's police notebook was produced at the Inquiry by counsel for Mr. McGuigan; it was marked as Exhibit 300 and it reflected that he had attended a session with Crown attorneys and police at 12 Division on April 24, 1986 at 7:00 p.m. The notes indicate that Mr. McGuigan was there on that

occasion and there were brief notes as to what was discussed at this educational session.

Mr. Joll testified that Mr. McGuigan talked about the role of the Crown attorney in a criminal prosecution. He began his talk by outlining the traditional British definition, that is, a fair and unbiased presentation of the facts to the jury and without a vested interest in the outcome. The only interest was to ensure that justice was done. Mr. Joll said he found nothing unusual in that definition and that he believed that to be the Crown attorneys' role.

Then, according to Mr. Joll, Mr. McGuigan said "hogwash" or "bullshit" and proceeded to say it was the Crown attorneys' job to win by any means at their disposal; that the police had spent a lot of time and energy in getting their pinch, their arrest, and the job of the Crown attorney was not to fumble or drop the ball — it was to ensure that the individual charged was properly prosecuted and a conviction registered. The end justifies the means; it does not matter how you got the conviction. Defence counsel were described by Mr. McGuigan as "sleazebags" or "scumbags"or "slimeballs"; there was no real difference between the lawyer and his client as far as he was concerned. Mr. Joll said Mr. McGuigan described the accused in similar terms. Those comments, according to Joll, were received favourably by the police who were present; however, Mr. McGuigan's comments were not reflected in Joll's notebook.

Mr. Joll testified that he was upset and disappointed and saddened by Mr. McGuigan's remarks; he felt he had sullied the whole profession.

Subsequently, in February 1995, after the DNA results that cleared Mr. Morin were published, Mr. Joll met a lawyer he knew at the provincial court house in Brampton. Mr. Joll told him that he had been disappointed with the conviction of Guy Paul Morin at the second trial, but he was not wholly surprised knowing that McGuigan was the chief Crown attorney on the case. He spoke about McGuigan's lecture and the lawyer asked if he would provide a written statement about this for Mr. Pinkofsky, counsel for Mr. Morin. Mr. Joll ultimately drafted a written statement that eventually was faxed to Mr. Pinkofsky on February 27, 1995, together with a covering letter. These documents were forwarded to Commission counsel on September 18, 1997.

In cross-examination by Mr. Lockyer, Mr. Joll testified that if he were still a member of the Peel Regional force, he would not have provided a statement because he would not have had the courage to come forward. According to him, the police always close ranks and defend themselves.

Mr. Joll was vigorously cross-examined by counsel for Mr. McGuigan as to his credibility and about his motives for testifying at the Inquiry.

Mr. McGuigan testified before me that he was involved in lectures given by the Crown attorneys in Peel Region to the police in that area. He conceded that it was quite possible that he gave a lecture to the police at 12 Division in 1986 or 1987 in the evening between 6:00 and 7:00. He was accompanied by other Crown attorneys, but he did not recall who they were. He does not recall the topic of his lecture. He did not know Mr. Joll. He would agree with Mr. Joll's evidence that he would introduce everyone who was there; it seemed reasonable to him that he would do so. He testified that, if he spoke about the role of the Crown attorneys (although he was surprised that it was alleged that he did so) it would be sensible that he would convey the message that they would do their best to help the police with their tasks. He denied that he presented the attitude that Mr. Joll said he did at that meeting. Mr. McGuigan testified that what Mr. Joll said about his lecture is totally opposite to what he believes. He did not make the statements attributed to him by Joll, nor did he use some of the language that Joll said he did, although, not surprisingly, he does use the word "bullshit" on occasion.

Mr. Levy called 22 witnesses on behalf of Mr. McGuigan in relation to the 'Joll' lecture. Some were Crown attorneys and others were police officers. Almost all of them had attended educational sessions for police which had been addressed by McGuigan. All swore that Mr. McGuigan had never described the role of the Crown attorney in the manner told by Mr. Joll. Many of them testified that, on the contrary, whenever Mr. McGuigan outlined the role of the Crown attorney he described it as a dual role: on the one hand, the Crown was a vigorous advocate for the prosecution; at the same time he or she was a minister of justice with a duty to the court and a further duty to be fair to the defendant. Many testified to Mr. McGuigan's excellent reputation in the police and justice communities for honesty and integrity.

For example, Paul Michael Taylor, the present Crown Attorney in Peel Region, who had worked under Mr. McGuigan for 21 years, testified that he had attended educational road shows on a number of occasions and had heard Mr. McGuigan speak at them. He was aware of the words attributed to McGuigan by Joll and swore that if McGuigan had spoken about the role of the Crown in that manner he would have had difficulty continuing to work for him. Mr. McGuigan always spoke of the Crown's special role as a minister of justice. He disagreed that McGuigan was known as a Crown attorney who was pugnacious and unbending.

Leonard Favreau gave evidence on behalf of Mr. McGuigan. He is a detective sergeant with the Peel Regional force and has been a police officer since 1982. He had worked with Mr. Joll in the Youth Bureau. Mr. Favreau had his own notebook for April 24, 1986, and it noted that he had attended the lecture at 12 Division, but there was no record of what had been discussed. He conceded that McGuigan introduced the other Crown attorneys, but he had no recollection as to what else he had spoken about. He had no recollection of Mr. McGuigan saying what Joll said he did at the lecture, but it would have shocked him if McGuigan had used the words attributed to him. He and Joll were friendly and they socialized. In addition, Joll and he confided in each other and Joll never talked to him about the incident as he would have expected if it had occurred. It should be noted that Mr. Joll admitted in cross-examination that he socialized with Favreau and, although he did not specifically recall doing so, he might have discussed the McGuigan lecture with him.

Favreau knew Joll to be an honest, reliable person who had shown no hostility towards Mr. McGuigan; however, he was shocked by Joll's testimony because, in his view, the incident involving McGuigan never happened. He would have remembered if McGuigan had said anything improper.

Carolyn Harrison is a teacher at Conestoga College. Prior to that she had been a member of the Peel Regional force from 1990 to 1998. She had attended sessions at 12 Division given by Crown attorneys, but she no longer had her notebook in which they might have been reflected. She recalled that Mr. McGuigan spoke at such a lecture when she was in the Youth Bureau. Joll was in the same Bureau at the time. She never heard McGuigan speak the words attributed to him by Joll. She would have been shocked if he had said

those things because she had a lot of respect for him. Joll never spoke to her about the matter although they had worked and socialized together. She agreed in cross-examination that Joll was at her wedding and that he was an honest person whom she trusted when they worked together.

Another witness called on behalf of Mr. McGuigan in relation to Joll's evidence was Mark Saltmarsh, who has been an Assistant Crown Attorney in Brampton since 1985 and who worked under McGuigan. He believed that he attended an educational session at 12 Division in 1986. He had no specific recollection of dates, but he recalled that Mr. McGuigan was present. He had never heard McGuigan speak the words attributed to him by Joll. He had heard McGuigan speak about the role of the Crown attorney; he said they were to act as ministers of justice and conduct themselves with integrity.

Claude Gelbard has been with the Peel Regional force for 20 years. He served on the Youth Bureau with Joll until April 27,1986, when he left the Bureau. He testified that a couple of days before he left the Bureau he attended a training session at 12 Division. To the best of his memory he never heard Mr. McGuigan express the comments attributed to him by Joll. If Mr. McGuigan had spoken those words he would have remembered and he would have lodged a complaint.

Brian O'Marra was with the Peel Crown office from 1982 to March 1993, when he became the Crown Attorney for Halton Region. He testified that he attended educational programmes where McGuigan had spoken to the police. McGuigan's comments, as repeated by Joll, are quite the opposite of what McGuigan conveyed both inside and outside of the Crown's office. McGuigan always spoke of the Crown's special role as a minister of justice. He swore that Mr. McGuigan's reputation for honesty and integrity was impeccable.

Findings

The evidence of the witnesses set out above is a fair sampling of the nature of the testimony given by the 22 witnesses called on behalf of McGuigan in relation to the allegations made by Joll. The sentiments which Mr. Joll has attributed to him about the role of the Crown in a criminal prosecution would run contrary to the role that the Crown should assume, as

earlier articulated in this chapter.

If the words attributed to Mr. McGuigan had actually been expressed by him, they would have been relevant to prove a propensity on his part to seek convictions at any cost of the defendants in the cases he prosecuted and, therefore, relevant to his conduct in the prosecution of Mr. Morin.

Mr. Joll's evidence was attacked on the basis that it was ill-motivated and deliberately false. The cross-examination did not address the possibility that Mr. Joll misconstrued a forceful (but appropriate) articulation of the Crown's role as advocate. Mr. Joll appeared to me to be an honest witness. I do not find that his testimony at this Inquiry was ill-motivated or deliberately false. On the other hand, the police and Crown attorneys who gave evidence on behalf of Mr. McGuigan on this issue, including Mr. McGuigan himself, also were credible. It is clear that Mr. McGuigan properly described the role of Crown counsel on other occasions. On the totality of the evidence, I do not find that Mr. McGuigan described the role of Crown counsel in an inappropriate way.[46]

(vi) The Stay Motion

Overview

The 'stay motion,' brought on behalf of Mr. Morin for an order terminating the criminal proceedings against him, commenced on May 28, 1990. The main issues included the alleged misleading disclosure and material non-disclosure by Crown counsel of the first trial, as well as police conduct.

Mr. Gover, Crown counsel on the motion, told the Inquiry that the Crown's strategy on the stay motion was to

> give the defence every opportunity to make out what it

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[46] The character evidence tendered on behalf of Mr. McGuigan, Mr. Smith, Ms. MacLean, Inspector Shephard and others was impressive and was considered by me, in the way described in Chapter I of this Report. Accordingly, though some of this evidence was introduced in the context of Mr. Joll's allegations, the character evidence had general application.

> was alleging, and then, at the end of the motion, to point out that, for example, there had been few limits placed on the examination of witnesses, that we didn't insist on relevance being shown prior to evidence being led and that we didn't in any way thwart the inquiry that the defence was embarking upon.

Brian Gover called as witnesses Mr. Scott, Ms. MacLean, Inspector Shephard, Detective Fitzpatrick, Detective Nechay and Detective Bunce. Wide latitude was extended in the examination of other witnesses, recognizing that they were adverse in interest to Mr. Pinkofsky's client.

It was originally anticipated that this motion would take two to three weeks; instead, it lasted eight months. Mr. Gover described the frustration that mounted during the stay motion over the amount of time it was taking.

Disclosure Issues

The current jurisprudence relating to disclosure is summarized by Doherty J.A. in *R.* v. *Girimonte*.[47] He stated, *inter alia*:

> Full disclosure is fundamental to the right to make full answer and defence. The Crown has both a legal and ethical obligation to make that disclosure. While the Crown's obligation to make full disclosure is quite properly stressed, defence counsel also has an obligation to act "responsibly" in the course of the disclosure process: *R. v. Stinchcombe, supra,* at p.12.
>
> .....
>
> The Crown's disclosure obligation is firmly established. The Crown must disclose to the defence all information whether inculpatory or exculpatory under its control, unless the information is clearly irrelevant or subject to some privilege which justifies the refusal to provide that information to the defence. Information is relevant for the purposes of the Crown's disclosure obligation if there is a reasonable possibility that withholding the information will impair the accused's right to make full answer and defence. Full answer and

[47] (1997), 121 C.C.C. (3d) 33 (Ont.C.A.).

defence encompasses the right to meet the case presented by the prosecution, advance a case for the defence, and make informed decisions on procedural and other matters which affect the conduct of the defence: *R. v. Stinchcombe, supra,* at pp. 10-14; *R. v. Egger* (1993), 82 C.C.C. (3d) 193 (S.C.C.) at 203-4 (S.C.C.; *R. v. Chaplin* (1995), 96 C.C.C. (3d) 225 at 233-234 (S.C.C.).

The accused's right to disclosure is a principle of fundamental justice and a component of the constitutional right to make full answer and defence. Full and timely disclosure by the Crown enhances both the fairness and reliability of the trial process. The Crown's failure to meet its disclosure obligations results in a breach of an accessed's rights under s.7 of the *Charter* and entitles the accessed to an "appropriate and just" remedy under s. 24(1) of the *Charter: R. v. Carosella* (1997), 112 C.C.C. (3d) 289 (S.C.C.) at 301-306.

The Crown's obligation to disclose is triggered by a request for disclosure from counsel for the accused. Initial disclosure must occur sufficiently before the accused is called upon to elect or plead so as to permit the accused to make an informed decision as to the mode of the trial and appropriate plea. In a perfect world, initial disclosure would also be complete disclosure. However, as is recognized in *Stinchcombe, supra*, at p.14, the Crown will often be unable to make complete disclosure at the initial stage of the disclosure process. There will also be rare cases in which the Crown can properly delay disclosure until an investigation is completed. If full disclosure cannot be made when initial disclosure is provided, the Crown's obligation to disclose is an ongoing one and requires that disclosure be made as it becomes available and be completed as soon as is reasonably possible. In any event, an accused will not be compelled to elect or plead if the accused has not received sufficient disclosure to allow the accused to make an informed decision.

The disclosure process requires that the Crown make the initial determination of what material is properly subject to disclosure to the defence. In making that

> determination, the Crown must exercise the utmost good faith and be guided by the spirit and the letter of *Stinchcombe*. The Crown's determination is subject to judicial review.

At the time of the stay motion, the rules governing disclosure were relatively uncertain. I am mindful of the fact that the exercise of prosecutorial discretion relating to disclosure prior to the second trial occurred without the benefit of the seminal judgment of the Supreme Court of Canada in *R. v. Stinchcombe.*[48]

Mr. Gover described how, at the outset of the stay motion, his approach to disclosure differed from that of Ms. MacLean. According to Mr. Gover, Ms. MacLean was initially concerned that the disclosure decisions made by him could be seen to undermine the original disclosure decisions made in 1985. The two prosecutors clashed on this issue from time to time. It was his view that, at least for the first few months of the motion, Ms. MacLean "identified closely with the police officers who were being accused of various types of misconduct." He noted that she had worked on the case for most of her career up to that point, virtually exclusively, with that police force. Mr. Gover told the Inquiry:

> I was critical of Susan at the beginning of the motion. And I think that if I were to put in a nutshell her attitude, for example, toward disclosure, at the beginning of the motion it was: 'how is that relevant, why should we disclose it?' to, by the end of the motion, 'why shouldn't we disclose it, it may be relevant.'

Mr. Gover said that both Mr. Scott and Mr. McGuigan "took a fairly hands off position" in relation to disclosure decisions made by Mr. Gover.

However, he recounted a schism between his position and that of the police and of Ms. MacLean which came to a head around July, 1990. He said:

> Sergeant Shephard did not trust me and said from time to time that he felt the police should have their own

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[48] (1991), 68 C.C.C. (3d) 1 (S.C.C.).

> lawyer present in the court room on the abuse of process motion.

Mr. Gover also recalled concerns expressed by both Shephard and MacLean over the practical aspects of the motion in terms of bringing police officers down to London who would then have to wait for days to testify.

Inspector Shephard was asked whether he recalled heated conversations with Mr. Gover about the manner in which the disclosure motion was being conducted. He responded "certainly not [about] the way he was conducting the disclosure motion" but he did recall a heated discussion with Mr. Gover about officers who were not under subpoena being called to London -- only to wait for days to testify, at considerable cost to and hardship to the department. Inspector Shephard's recollection was that if officers cooperated and reviewed their notes with the defence, they were called that day or the next. Otherwise, they were kept waiting for up to a week or longer. At one point there were seventeen officers in London.

Mr. Gover expressed his view that the Durham Regional officers, particularly Detective Fitzpatrick and Inspector Shephard, did not understand the scope of the abuse of process motion and "essentially treated me on a need-to-know basis." This was "overcome when the point was made that clearly I had to know everything there was to know about some of these other suspects in order to ensure that the Crown was properly represented". In his view, the motives of the police in failing to disclose certain documents were due to the fact that "they didn't appreciate their duties in relation to disclosure. Mr. Gover said:

> They hadn't acquainted themselves with the work of other teams within their own force, and other investigators who had been working with the York Regional Police Force. ... Shephard and Fitzpatrick had not taken proper steps to acquaint themselves with other suspects.

Mr. Gover confirmed that at the time of the stay application he was aware that disclosure had not been made, relating to:

- other suspects;

- the Janet and Ken Jessop will-says and prior statements relating to timing;
- the laundromat test;
- suspicious sightings and suspicious cars;
- the Horwoods;
- the OPP report regarding the 'partial fingerprint' that Michalowsky testified about at the first trial;
- additional bones found by the Jessops;
- some favours done for the jailhouse informants;
- the problems associated with Michalowsky;
- the loss of evidence through the failure to investigate, such as the Bell Telephone records concerning Janet Jessop's visit to their offices; and,
- the Pamela Watson interview concerning Ms. Jessop's visit to Household Finance.

In light of these omissions, Mr. Gover said that he "regarded it as by no means certain that the motion would not succeed." I will discuss a few of the above matters only.

Jessop Will-Says

John Scott was provided with a 3-page legal-size document entitled "Evidence of Kenneth Jessop," prepared by Detective Fitzpatrick prior to the first trial, which became part of his Crown brief. The document contained very detailed evidence relating to the timing of Ken and Janet Jessop's whereabouts on October 3, 1984. This document was not provided to defence counsel; instead, John Scott revised the will-say of Ken Jessop's anticipated evidence and provided the defence with a one-page edited version. In the revision, he deleted the following portions of the evidence of Ken Jessop:

- "Mom bought me a wristwatch." Mr. Scott cannot recall why he removed this, but believes it was because Ken Jessop said that he looked at his watch as he arrived home and it was 4:10, while Janet Jessop said that she looked at the clock, and it said 4:20.

- "I was only "in the dentist's" minutes. All he did was a check-up." Mr. Scott said that he removed this because it was clearly an error when one considered Dr. Taylor and Ms. Lowson's evidence.

- "When we came in the house, I remember Mom looking at the clock and saying it was 4:20." Mr. Scott stated that he removed the 4:20 notation in particular because it was his information that Ms. Jessop told the officers that, when she looked at the clock she stated that it was 4:10. Mr. Scott said that he removed the position about looking at the clock because it was seen as being "part of what I viewed as an error sentence. It was not accurate."

- "She [Janet Jessop] said she had time to have a coffee and think about what she was going to say to the lawyer, Mr. A. Kuracas when she called him at 4:45." Mr. Scott had difficulty recalling why he deleted this reference.

- "We mainly searched the fields. I stayed out until midnight. Then I came in and went to bed. The police were at our house all night. One of the officers came up and woke me up around 2:00 a.m. and did the same thing you're doing now." Mr. Scott did not believe that this was relevant evidence.

When asked about the deleted references to timing during the Inquiry, Mr. Scott said that the material was removed because "it was unreliable." In his view, Ken Jessop's statements in this regard were not accurate. He had met Ken Jessop once or twice and had spoken to him about issues in order to determine whether to call him to give evidence at the first trial. He decided

not to call him and was concerned that the times put forward by Ken Jessop were in conflict with one another. Mr. Scott does not believe that he reviewed other notes or statements documenting the Jessop timing before vetting the will-say, but maintained that he was aware of them from the information of the investigating officers.

In retrospect, Mr. Scott told the Inquiry that it would have been better to have allowed the defence to view this evidence to enable them to come to their own opinion as to the reliability of Ken Jessop. He agreed with counsel's suggestion that he probably should have indicated, at least in brackets, times mentioned by Ken Jessop. He stated that in the post-*Stinchcombe* environment all material would have been disclosed; however, at the time of making these decisions, he believed that Ken Jessop was simply in error and therefore vetted the will-say accordingly.

In the context of this issue, Mr. Scott was also questioned on the propriety of calling a witness at trial whose credibility was suspect. He said:

> I think as a Crown you've got to make some conclusion, this is credible evidence because I think that's probably in *Boucher* or one of those older cases. But, it just gets so confusing when you start making these decisions yourself because – let's assume for a moment that there's a case I'm prosecuting and I make this decision, if this isn't, in my view credible evidence, I don't lead it.
>
> Later on it turns out it's completely credible evidence and the individual harms someone else in the interim as a result of me not leading this evidence, they're acquitted. And then we've got an Inquiry into that as to what I'm doing in not leading evidence that's available to me, but I've made some decision that I don't feel it is credible which somebody else questions later.

Mr. Scott knew that Janet Jessop was going to be a witness. He was provided by the investigators with a legal-size document providing a detailed summary of Mrs. Jessop's activities on the day that her daughter disappeared. It included the following statement:

> I picked Ken up, it was about 4:20 p.m. and we came straight home. We got home at 4:35 p.m. The dog was

> inside.

She also, however, commented in the last paragraph of this document:

> I had originally said I got home around 4:00 p.m., but after talking to the investigating officer, I realised I had made a mistake and the earliest time I could have gotten home was 4:35 p.m. I may have even — I may have been even later, approximately 4:45 p.m.

This will-say was not provided to the defence by Mr. Scott. Instead, Mr. Scott advised defence counsel that Ms. Jessop's evidence was as set out in the preliminary inquiry.

In Ms. Jessop's preliminary inquiry evidence, however, she testified as follows relating to the time that she returned home:

> Q. What time did you arrive home from the dentist?
>
> A. That I can't remember.
>
> Q. Well, was it before 5 o'clock?
>
> A. Definitely.
>
> Q. Was it before 4:30?
>
> A. Well I honestly don't know. I know by the time I looked around for Christine and I had to make a call, I made a cup of coffee, looked around for her, I called, made my call roughly quarter of five.
>
> .....
>
> Q. In the area of your home - you don't give what time you arrived. Can you at least give us an estimate? Just give us a ballpark figure?
>
> A. Well, I really don't know. I know what time I made my phone call.
>
> Q. And that was quarter of five?
>
> A. Around there.

> Q. You'd have been home how long at that point?
>
> A. It wouldn't be any more than ten or fifteen minutes.
>
> Q. All right.
>
> A. At the most.
>
> Q. So you arrived perhaps 4:30, 4:35?
>
> A. Um hmm.
>
> Q. Is that correct?
>
> A. Could be, yes.

Mr. Scott told the Inquiry that he did not provide Ms. Jessop's will-say to the defence because:

> A. I just had no confidence in the times as given in those documents, nor any time but the time she told the police, which was, 'got home at 4:10.' And I know there are specific times there [in the documents] but I think if you go through them you'll see they don't work.
>
> Q. Do you think, however, considering that timing was an issue, then it would have been of value to .... to defence counsel to see that the statements don't work. They could have utilized them because timing was of crucial importance.
>
> A. I don't, respectfully, think that Mrs. Jessop's timing was crucial at all in the proceedings. I think the time that she announced she got home was important, but you're right, I'm doing things from a perspective.[49]

[49] Mr. Scott's counsel fairly commented following this question that the timing in the first trial was not the issue that it was in the second trial or became at this Commission.

Findings

As Mr. Scott admitted, it would have been better had he not vetted the will-says in the way he did. Certainly, the defence was entitled to know that different times were given on different occasions by Ken and Janet Jessop, and they could then have dealt with it in whatever manner they saw fit. That, however, is not only today's wisdom, but also today's law. In 1985, the Crown was obligated, as it is now, to disclose exculpatory evidence. However, I understand Mr. Scott's interpretation of his obligation at the time and, whereas it constituted an error in judgment, I accept his explanation and find no deliberate attempt to circumvent his obligations. I should say that, in so finding, I am mindful of the fact that Mr. Scott did not press Ms. Jessop to confirm the 4:30 to 4:35 arrival time (when he led her evidence at the second trial) and elicited from her that she had earlier told the police 4:10 p.m. I appreciate that Mr. Ruby's approach to the timing issue might have been different had he been aware of the full extent of the Jessops' prior statements, but Mr. Scott's approach at the first trial is relevant to the absence of any *mala fides.*

The Laundromat Test

During the first trial, Janet Jessop testified that she used the Dutch River Laundromat in Holland Landing. Guy Paul Morin testified that he, too, regularly used this laundromat. Defence counsel suggested that a transfer of fibres may have occurred through use of the same laundromat.

A textile expert, Herbert Pratt, called by the Crown, was cross-examined by Mr. Ruby on the possibility that fibre transference may have occurred by the use by the two households of the same laundromat. Mr. Pratt said environmental contamination of this sort was possible, but it was contingent on a number of assumptions. He did not enthusiastically endorse this possibility because he believed that the item from which the pink animal fibre originated would have been dry-cleaned. Another expert, Barry Gaudette, a fibre examiner with the RCMP, was also called by Mr. Scott during the first trial. He conceded in cross-examination that if both the Jessop and Morin families laundered at a common laundry, it could be a possible source of environmental contamination.

At Mr. Scott's behest, a test was conducted by Constable Harry

Shephard of the Durham Regional Police Identification Bureau during the first trial. Mr. Scott told the Inquiry that he believed the proposition of fibre transference was nonsense as no one would wash something with animal fibre in a laundromat. The result of the test performed by Constable Shephard was indeed an "obvious" transfer of fibres from angora items washed in one load of laundry to items washed in a second load of laundry. Mr. Scott did not disclose the results of the laundromat test to defence counsel:

> I thought it was completely irrelevant, completely of my making that the evidence had been well-covered by the experts in terms of the possibilities. I thought the chances of these people doing laundry back-to-back were nil, and that's the issue that I went to the jury on, is that — not that there couldn't be this transfer from this laundromat item that everybody said you wouldn't wash anyway, but that the chances or the likelihood of this happening were just not there.

During Mr. Scott's closing address to the jury, he was less than clear in his statement to the jury relating to the laundromat issue:

> We will go back, because I told you I was going to go back to the hairs and fibres, the mute witnesses. I indicated to you initially when we started this case, there wasn't a lot of possibility, a lot of laundromats, and so on.[50]

Mr. Justice Donnelly held that the laundromat test was pre-trial preparation and not discoverable.

Findings

In my view, the laudromat test was discoverable and ought to have been disclosed to the defence. Again, I see this as an error in judgment, rather than a deliberate circumvention of Mr. Scott's obligation to disclose.

Fingerprint Evidence

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[50] Note that Mr. Scott had not earlier referred to the laundromat in this closing statement.

A partial fingerprint was apparently found on Christine Jessop's recorder. On December 30, 1985, Detective Fitzpatrick and Inspector Shephard delivered the recorder and the lifted partial fingerprint to Constable Brian Dalrymple of the Ontario Provincial Police for further examination. Mr. Scott drove to the OPP headquarters with them on that day. On January 3, 1986, Sergeant Chapman picked up the recorder, the print and Constable Dalrymple's report, dated the same day, and gave them to Detective Fitzpatrick. The report advised that the impression on the recorder was "unsuitable for comparison." Detective Fitzpatrick was "sure" that he told Mr. Scott of the report.

Sergeant Michalowsky testified during the first trial that Mr. Morin could not be excluded from having touched the recorder as the lifted print had whorl patterns similar to those found on Mr. Morin's fingers. It was made clear, however, that 27 to 30 percent of all prints have a whorl pattern. Mr. Scott did not recall receiving the report back from Officer Dalrymple, nor can he remember if he saw the report during the trial process. He did not quarrel with Detective Fitzpatrick's evidence that he advised Mr. Scott of it. The latter did not disclose this report or the fact that the OPP were considering the matter prior to Mr. Ruby's cross-examination of Sergeant Michalowsky. Mr. Scott agreed that he probably should have done so. It was John Scott's position during the Inquiry that the OPP report came to the same conclusion as Michalowsky — that there were insufficient points of similarity. Mr. Scott said that, assuming he had this information, he did not see it as inconsistent with Michalowsky's position.

During the trial, Mr. Scott made submissions to Mr. Justice Craig that Sergeant Michalowsky's fingerprint findings from the recorder were admissible, and he filed the recorder as an exhibit. On January 13, 1986, Mr. Justice Craig ruled that the evidence was admissible, but of limited probative value. On that date, Sergeant Michalowsky's examination in-chief, including his evidence about his fingerprint findings, was completed.

At the Inquiry, counsel for Mr. Morin put this to Mr. Scott:

> Q. And I suggest to you, Mr. Scott, that you didn't follow up on it [OPP analysis], and you didn't disclose its existence, because you saw it as damaging your position in terms of trying to get Michalowsky's evidence in.

A. I disagree.

At the Inquiry, Sergeant Robinet was asked about the propriety of providing evidence that a fingerprint "could not be excluded" as coming from a particular individual:

> Q: Have you ever heard of such evidence sir, in a fingerprint context, Have you ever given evidence of that nature, that a fingerprint cannot be excluded as having come from someone, as opposed to a fingerprint either did or did not come from someone?
>
> .....
>
> Can't be excluded, that's the question. Have you ever testified ---
>
> A. No, I'm sorry, I never use that terminology.
>
> Q. Right. So you've never stood up and said, sir, this partial print that can't be identified, has a particular pattern in it, one of the fingers of a suspect has that pattern as well, therefore, maybe it's his print, but I can't say whether it is or it isn't. You've never given evidence like that?
>
> A. No.
>
> Q. Did you know that Michalowsky was giving evidence of that nature, sir, at the first trial? That he was trying to actually present that as a proposition?
>
> A. I believe there was a whorl pattern on the recorder, and I believe Mr. Morin had a whorl pattern on one of his digits. It couldn't be identified to him, whether he gave evidence of that nature, I don't know.
>
> Q. But he did. Would you have agreed to give evidence of that nature, sir?
>
> A. No.
>
> Q. ... As a fingerprint examiner, are you a member of an organization, sir?
>
> A. Yes, sir.

> Q. What is it?
>
> A. ...Identification of Fingerprint Examination.
>
> Q. Okay. Is that a society, an association?
>
> A. Yes, also Michigan Ontario Identification Association.
>
> Q. Do you think either of those organizations, sir, would approve of one of its members getting up on the witness stand and giving the type of evidence that you know Michalowsky gave at the first trial?
>
> A. No, they wouldn't.

Subsequently, in 1991, the fingerprint on the recorder was analyzed by the RCMP. In a letter dated January 14, 1991, Sergeant David Ashbaugh advised the Crown attorneys that the fingerprint on the recorder was actually two partial prints. He added:

> One print appears to be a whorl pattern but only half of the pattern area is visible. This fact can be misleading as [certain other patterns] would appear similar if only partially disclosed. Therefore pattern type is not a certainty.

The print was compared to the fingerprints of Betty Balsdon (Christine Jessop's teacher), Sergeant Michalowsky, and Guy Paul Morin. The RCMP was unable to identify or eliminate any of these people.

Findings

It is likely that Officer Fitzpatrick did provide the OPP report to John Scott. However, I again do not find that any failure to disclose on Mr. Scott's part was a deliberate circumvention of his obligations.

The fingerprint evidence also raises a systemic issue. The introduction of evidence that a partial fingerprint could have come from Guy Paul Morin, based upon limited similarities, raises the same issues addressed in the context of hair comparison evidence: does the probative value of such evidence, even if viewed cumulatively, truly outweigh its prejudicial effect

and justify its reception in support of guilt. Although the subsequently acquired knowledge that this partial fingerprint did not originate from Guy Paul Morin cannot dictate the answer to this question (or to the hair comparison issue) the dangers associated with this partial fingerprint evidence are surely highlighted by that known fact.

I accept Constable Robinet's evidence on this issue. In my view, it is a dangerous practice to admit such evidence. Its probative value is minimal and its potential for prejudice is substantial. In my view, my recommendations respecting hair comparison evidence are equally applicable here.

Other Suspects

During the stay motion, an issue arose as to whether information regarding other suspects should be released to defence counsel. At the first trial, Mr. Scott had made no disclosure of such information. He testified:

> A. That area of suspects, I didn't have it in the brief. I didn't inquire about it, no inquiries were made about it until Mr. Pinkofsky made inquiries about it, and then material was provided.
>
> Q. So did you know anything about the other suspects prior to the conclusion of the first trial, sir?
>
> A. No.

Mr. Scott said that it was not his practice to canvass investigative files.

In the Submissions on behalf of the Morins to this Inquiry relating to the disclosure of evidence of other suspects, it is stated:

> Once again, Scott suggested in his evidence that it was the defence who was at fault because they were aware of a press release that referred to the FBI profile fitting four or five suspects. This, again, misses the point. The Crown had duties and expectations associated with its office in 1985. Scott failed to fulfil them. He also edited other suspect material out of the will says of

> James Cull and Kim Warner. Scott himself should have inquired about other suspects in response to written defence demands for disclosure of all matters pertaining to Morin's innocence.

Similarly, the submissions of the Morins make mention of the non-disclosure of suspicious car sightings to the defence prior to the first trial as well as certain potential witness statements, including the Horwoods (whose evidence is discussed elsewhere in this Report).

During the Inquiry Mr. Gover discussed the "fierce debate" between Inspector Shephard, Detective Fitzpatrick, Susan MacLean and himself as to whether information relating to a certain suspect should be disclosed. It was Gover's view that all the reports with respect to this suspect should be disclosed, as he was familiar with the area where Christine Jessop lived and was seen cleaning his van shortly after she disappeared. He had been in the area of Sharon and Newmarket that day. The suspect himself disappeared shortly after Christine's abduction. Ultimately, this information was provided to Mr. Pinkofsky, along with a banker's box of supplementary reports created by Detective Fitzpatrick and Inspector Shephard containing a substantial amount of material pertaining to numerous other suspects.

Mr. Gover recalled meetings at which the disclosure of information relating to other suspects was discussed. There was a concern raised by the Crown attorneys that Mr. Pinkofsky might try to turn Mr. Morin's trial into a trial of other suspects. Mr. Gover expressed his frustration in being treated by investigators on "a need to know basis." In particular, he recalled

> not knowing about other suspects in the detail that I needed to know about them in order to respond to the allegations that were being made by Mr. Pinkofsky.

Findings

The 'other suspect' evidence raises two issues — one, disclosure, two, the admissibility of evidence of other suspects in a criminal trial. There is no doubt that the police were resistant at times to the disclosure being provided by Mr. Gover to the defence. This resulted, in part, from a fundamental misunderstanding of the disclosure process.

I later recommend that a Committee, similarly constituted as the Martin Committee, address a number of outstanding disclosure issues. One of those issues should be the disclosure of other suspects and access to an 'open box' generally. In a major investigation, many tips and potential suspects are reflected in the investigative files. The wholesale disclosure of each and every name generated in the course of the investigation raises logistical and privacy issues. For example, a major investigation may yield a list of every person who has ever been convicted of a sexual offence who resides within a certain area. To what extent should these names, together with the investigation into their possible involvement, be disclosed and in what form and with what limitations? Of course, one or more of these names may, in turn, yield evidence that the crime was committed by a person other than the accused. There have been notorious miscarriages of justice where other suspects, later shown to be the perpetrator, were known to the authorities and not disclosed. Without reflecting upon the merits of an ongoing case, I am aware that this issue is alleged to arise in the *Milgaard* case. The scope and means of disclosure of other suspects, consistent with the right to make full answer and defence and the need to ensure that the innocent are not convicted, is an important issue, the resolution of which is beyond the scope of this Inquiry.

I have reviewed carefully the evidence bearing upon Mr. Scott's alleged violation of his disclosure obligations. I have also extensively reviewed the submissions of counsel bearing upon this issue. The evidence as to what he knew and when is less than clear to me. The extent to which officers informed Mr. Scott of information or evidence available to them is less than clear to me. In brief, I am not satisfied that Mr. Scott violated the disclosure requirements which existed at the time and, in any event, I do not find that he did so deliberately.

The admissibility of 'other suspect' evidence at the instance of the defence raises an important systemic issue, which is addressed in my later recommendations.

Conclusion

I have addressed the issues arising out of the stay motion with great brevity. As I indicated in Chapter I, the disclosure issues were of more limited relevance to my mandate, given the disclosure which was effected

prior to the commencement of the second jury trial wherein Guy Paul Morin was wrongfully convicted. It is my view that errors in judgment were made by Mr. Scott in failing to disclose certain items to the defence. (I pause to note that Ms. MacLean bore no responsibility for the disclosure decisions made prior to, or at the first trial. Mr. Scott acknowledged that.) I explored several of the undisclosed items at the Inquiry because those items bore more directly on the ultimate evidence tendered at the second trial. I accept Mr. Scott's evidence that he did not deliberately breach his disclosure obligations. Mr. Scott is fully aware of the Crown's disclosure obligations at present. Though, with respect, I do not agree with everything Mr. Justice Donnelly said in his ruling referable to alleged non-disclosure and misleading disclosure (noting that he did not have the benefit of the decision in *Stinchcombe* at the time of his original ruling.)[51] I agree with him that any failings on Mr. Scott's part were not malevolent.

It would also appear that the police failed to adequately disclose information to John Scott. Mr. Justice Donnelly found no misconduct on the part of the police in this regard. For the reasons already given, the disclosure issues played a small role at this Inquiry. As a question of priority, I did not explore in any meaningful way the investigators' responsibility for not disclosing items to the Crown or to the defence and, accordingly, I do not intend to make further findings in that regard.

G. Systemic Evidence and Recommendations

(i) Introduction

This part of the Report summarizes some of the systemic evidence relating to the conduct of police investigations and criminal prosecutions, in the context of the findings I have made and the issues I have identified. As I noted in Chapters II (Forensic Evidence) and III (Jailhouse Informants), certain issues also arise in connection with the conduct of appeals and the jurisdiction of appellate courts, which I also address. This part of the Report also summarizes the evidence heard in Phase VI of the Inquiry bearing upon

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[51] After *Stinchcombe* was decided, the issue was revisited with the trial judge who declined to alter his decision.

the systemic causes of wrongful convictions identified, *inter alia,* in the literature, by other inquiries, by participants in the administration of criminal justice and by those who have themselves been wrongly convicted.

Much of the evidence of systemic witnesses is summarized in the context of specific recommendations. More general evidence is summarized immediately below.

(ii) Systemic Causes of Wrongful Convictions

AIDWYC Systemic Panel

AIDWYC presented a multi-jurisdictional panel on the causes of wrongful convictions, which was to complement a study done on the same topic for use at this Inquiry.

Professor Dianne Martin obtained her LL.B from Osgoode Hall Law School at York University in Toronto and an LL.M. (with merit) from the London School of Economics in 1987. She is a member of the bar of Ontario who practised criminal law for over 10 years before assuming her present position as an Associate Professor of Law at Osgoode Hall. She was instrumental in coordinating the efforts of a number of persons in Canada, the United Kingdom and the United States to gather cases of wrongful convictions in those jurisdictions and to compile them into a study entitled *Wrongful Convictions: An International Comparative Study.* That study was filed as Exhibit 235. David Kyle, a barrister who, until 1997, was Chief Crown prosecutor for the Crown Prosecution Services in London, England, was a witness called by counsel for the Ontario Crown Attorneys' Association. He is presently a member of the Criminal Cases Review Commission in England, which investigates potential miscarriages of justice for possible reference to the Court of Appeal for reconsideration. He verified that the portion of Professor Martin's study that described certain miscarriages of justice in the United Kingdom was accurate.

Professor Martin testified that the key finding of the study was that wrongful convictions occur throughout the Anglo-American world, with very similar causes in each jurisdiction. Such convictions are not aberrations; there is a pattern of systemic factors that tend to lead to unjust results. A key factor in all cases is the police investigation. This may consist of simple error or of

deliberate police misconduct in influencing witnesses to alter their testimony. In the latter cases, according to the study, the police involved justify it because of their belief that the person charged is guilty of the crime and to ensure a conviction. Such conduct has been described as "noble cause corruption."

From her research, she cited the principal factors leading to wrongful convictions:

- The accused is charged with an heinous crime about which there is intense community concern.

- The accused is seen as an unpopular person, an outcast, who may be a member of a racial minority or may have a criminal record.

- The defence at trial is inadequate. Defence counsel may undertake an inadequate investigation of the facts. It is important that the defence be vigorous.

- The conviction rests primarily on suspect evidence: eyewitness testimony, confession evidence, jailhouse informant evidence, unreliable or novel science, or consciousness of guilt evidence. In cases where the crime charged is horrific, the scientists who testify may lose objectivity and fudge their results.

According to Professor Martin, these are the paradigmatic factors seen in such cases. I have concluded that some of these factors contributed to the wrongful conviction of Mr. Morin.

Mr. James McCloskey is a former officer in the United States Navy and business executive. Subsequently, he received the degree of Master of Divinity from Princeton Theological Seminary. He acted as a student chaplain at Trenton State Prison and became involved in the cause of a prisoner who, he felt, had been wrongly convicted and who was ultimately freed. He is the founder of Centurion Ministries, a non-profit organization that undertakes the causes of persons who, where Centurion's investigations so verify, are factually innocent of the serious crimes of which they have been convicted. He and his organization are to be commended for their important work on behalf of the wrongly convicted. He identified the

measures available to such persons and the procedures undertaken by his organization to attempt to have their innocence recognized by the authorities.

Centurion Ministries has accepted 49 cases and has completed its work on 33 of them. Of those 33, 25 have been freed.[52] The other eight cases were unsuccessful: one died in prison before he was entitled to be freed and two whom he believed to be innocent were executed. Centurion determined that some of the persons involved in the 49 cases investigated by them were, in fact, guilty of the crimes of which they were convicted and those causes were discontinued. Mr. McCloskey, whose evidence I found to be interesting and helpful, testified that, in his view, there are nine causes of wrongful convictions; many cases involve multiples of them:

- The presumption of innocence has become the presumption of guilt.

- Perjured testimony. He testified that it was pervasive in the cases he has considered. It may involve criminals who testify in exchange for a deal (whether secret or open); real murderers who testify against the defendant charged with the crimes they themselves have committed (they may even be the star witnesses); law enforcement officers who lie about confessions allegedly made to them which are coerced or concocted by them; other witnesses to alleged confessions, such as friends of the defendant, who may be marginal persons and are coerced by the police; police informants from the street who will give perjured evidence. The victim's family may be maneuvered by the police into giving false evidence.

- Eyewitness testimony. It may be accurate, erroneous or perjured.

- Forensic testimony. This may involve laboratory workers who see themselves as arms of the law. They may exaggerate their findings, or even manufacture them and give false evidence in the area of hair and fibres and blood.

- Overzealous and shoddy police investigations. Overwhelming police case loads may lead to taking shortcuts, with the result that crucial

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[52] Mr. McCloskey was deeply involved in investigating the wrongful conviction of David Milgaard.

pieces of evidence are overlooked; evidence that does not fit is dismissed or ridiculed or an attempt is made to get a confession, perhaps a jailhouse confession. The police may develop 'tunnel vision' and focus on only one individual and dismiss evidence that might point to a different suspect. A police culture that rewards case clearances may dictate police behaviour in the investigation of a case.

- Prosecutorial misconduct. An accurate jury decision depends on the integrity of the prosecutors in presenting a fair case and turning over whatever exculpatory material they have to the defence. A common feature of wrongful convictions is the withholding of important evidence by the prosecutors that can impeach their own witnesses or go to the innocence of the defendant.

- Ineffective Counsel. Mr. McCloskey testified that in the United States, most defendants are indigent and are at the mercy of the system. Many are dependant on the public defender system which is overwhelmed by the quantity of cases it is required to take on, diminishing thereby the quality of the defence. There are also court-appointed attorneys who may be 'in over their heads' in serious cases. They may not have the heart or the money to provide a vigorous defence. They may not believe their clients and may treat them in a dismissive way. They may not push the prosecutor for discovery (disclosure). Their cross-examination may be poorly researched and superficial. They may do very little investigation of the case.

- Judges' evidentiary rulings. Some judges tend to favour the prosecution in their rulings.

- Race and indigence in the United States. If one is a person of colour there may be a stronger presumption of guilt. There is also racism in the policing community. The biggest common characteristic of people who are wrongfully convicted is that they have neither money nor resources to defend themselves. The scales of justice are tilted because the state has unlimited resources.

Again, some of these factors have been found by me to have contributed to the miscarriage of justice that occurred in Mr. Morin's case.

Alistair Logan gave evidence at the instance of AIDWYC. He is a solicitor of the Supreme Court of Judicature of England and Wales. He acted for defendants in the notorious cases of the Guildford Four, the McGuire Seven and for Judith Ward, among others. His commitment to rectifying miscarriages of justice is impressive. He testified that although there have been a large number of cases in his jurisdiction where miscarriages of justice were identified, there has been no systemic analysis of the causes. He was grateful for the opportunity to discuss those issues at the Inquiry because, he said, of the apparent lack of interest in them in his own country. In the United Kingdom, in many instances each case is treated as idiosyncratic and without any history, from which no lessons may be learned.

Mr. Logan described the work in the U.K. of an organization called 'Justice.' It is comprised of lawyers, academics, members of Parliament, and former judges, who work together to uphold and strengthen the rule of law, to maintain high standards in the administration of justice, and to preserve the fundamental liberties of the individual. The organization gives help to people to whom the rule of law has been denied. However, it has limited funds; it is only able to consider in depth about 50 cases a year. Of those, they find about 15 where they are certain that there has been a miscarriage of justice. Regrettably, the organization is only able to take on five of those cases in which they feel they can achieve something.

Justice published *Miscarriages of Justice*, a document that analyzed wrongful convictions; it was filed as an exhibit at this Inquiry. According to Mr. Logan, that paper is more helpful in addressing the systemic issues that arise in cases of wrongful convictions than the Runciman Report (*The Royal Commission on Criminal Justice*), that was drafted in 1993 by a Commission appointed after the release of the 'Birmingham Six' who had been convicted of the bombing of certain public houses in Birmingham in 1973-1974, but were later cleared. The Runciman Report has been referred to by various counsel at the Inquiry, and is further addressed below. Mr. Logan does not consider this Report to be a document that would assist in lessening the risk of wrongful convictions, having regard to the terms of reference of the Commission that created it and the consequent focus of the investigation undertaken by that Commission.

Mr. Logan testified about the common causes of wrongful convictions as reflected in the report prepared by Justice. They are:

- Police Misconduct. There had been a problem with a police procedure known as 'verballing,' where a police officer asserted that a conversation took place with the accused which, however, was not recorded contemporaneously. It led to frequent contests between defendants and the police in which defendants accused the police of having invented a 'verbal.' With the advent of the requirement, contained in *The Police and Criminal Evidence Act, 1984*, that all interviews be tape recorded, and with the education of the police force, 'verballing' has now almost completely disappeared. However, false confessions produced as a result of considerable police pressure are a factor in cases of wrongful convictions. Mr. Logan detailed the nature of the police oppression that led to confessions in the case of his clients, the Guildford Four.

- Wrong Identification. Mr. Logan testified that this has not been a significant factor in producing wrongful convictions. However, he gave an example which demonstrated police pressure on an identification witness which led to an erroneous identification and a consequent miscarriage of justice. He referred to another case where information was withheld from the defence about the description of offenders given to the police by an eyewitness that was inconsistent with the description that the witness testified to at the trial.

- Perjury by co-accused or other witnesses. Mr. Logan gave evidence that there has been perjury on a grand scale leading to miscarriages of justice. He gave examples of perjury by police witnesses in certain notorious cases. He also testified to intimidation of defence witnesses by the police, so that those witnesses would not come forward with their evidence.

- Crown counsel's decision to withhold evidence about other suspects. Such evidence, he said, was sometimes suppressed by the prosecution, resulting, on occasions, in miscarriages of justice.

- Perjury by Forensic Witnesses. He testified to cases in which there was perjured forensic evidence and how those matters were dealt with by the appellate courts. He gave an example of a case where there was contamination in the forensic laboratory which was not revealed to the trial court by the scientists. He described scientific witnesses

who took an adversarial stance in presenting their evidence, and who did not want to say anything that would undermine the case for the prosecution. Some of these factors may be seen in the evidence of the forensic witnesses called for the prosecution at the second trial of Mr. Morin. Mr. Logan complained that, in his experience, such witnesses were unlikely to be called to account for their actions. However, Mr. Kyle described a case where a retired forensic scientist was prosecuted (unsuccessfully) for conspiracy to pervert the cause of justice.

- Bad trial tactics. Logan noted that the accused can pay for the tactical mistakes of their lawyers.

Nigel Hadgkiss is an Assistant Commissioner of the Australian Federal Police Force, with wide experience in the investigation of allegations of serious misconduct against public officials, including serving or past Commissioners of Police, senior officers of the National Crime Authority and the Australian Federal Police. In 1995, he was awarded the Australian Police Medal and was promoted to Assistant Commissioner. He holds an LL.B. and a Master of Commerce degree from the University of New South Wales. He has been seconded to three Royal Commissions in Australia, including the Royal Commission into the New South Wales Police Service for which he served as the Chief Investigator and Deputy Director of Investigations.

In May, 1994, the Royal Commission into the New South Wales Police Force was established, with The Honourable Mr. Justice J.R.T. Wood as Commissioner. Its terms of reference directed it to inquire into matters related to, *inter alia*, "the existence, or otherwise, of systemic or entrenched corruption" within that police force.

That Commission uncovered a mass of corruption on the part of police officers with that service. It also examined miscarriages of justice in Australia. It issued its final report in May 1997. Mr. Hadgkiss was aware of 35 claims of wrongful convictions dating back as far as 1969 currently being investigated as a result of the Commission's work. Mr. Hadgkiss outlined the following possible causes of miscarriages of justice which the Commission identified:

- An incompetent investigation, which has focused on someone other

than the offender and closed its mind to alternative avenues for inquiry.

- Corruption in its various forms.

- The use of unreliable prison informant evidence.

- Overzealous prosecution which encourages the propping up of a weak case or concealing from the defence evidence which would assist it.

- The use of evidence based on dubious forensic science or poor management of physical exhibits.

- Incompetent or under-resourced conduct of the defence case.

It should be noted that two types of corruption were analyzed by the Royal Commission: 'rotten apple' corruption and 'process' corruption. The 'rotten apple' concept, which seeks to explain police misconduct simply by the moral failings of individual officers (*i.e.* 'rotten apples'), was discredited by the Commission, which adopted the following view:

> [I]t would seem that acceptance by police managers and political elites, of a rotten apple concept of police corruption, is a defensive, face-saving exercise. The solution is simply seen as removing "bent" officers without a need to evaluate organizational procedures. It is, in essence, a means of "papering over the cracks" without admitting that there is a fundamental problem of major significance.

Mr. Hadgkiss agreed with the Royal Commission's view:

> Chiefs of police or commissioners invariably wish to think that they've only got one or two rotten apples for various reasons, probably confidence in their police service, political pressure to say all is well. And in fairness to them, they may only be briefed as to the culture that exists within their police service. They may not be intimately aware of what is happening at the operational end of the organization.

'Process' or 'noble cause' corruption was earlier defined by Ms.

Martin in her testimony.

Mr. Kyle, who had knowledge of some of the cases in the United Kingdom that were described by Mr. Logan as examples of miscarriages of justice, agreed that some of the factors listed by Mr. Hadgkiss, in different combinations, had contributed to the miscarriages in the English cases. There was no single factor; it was an accumulation of factors that contributed to the wrongful convictions in those cases.

I pause to say that some of these factors resonate with the case of Guy Paul Morin.

Mr. Hadgkiss submitted that to prevent wrongful convictions there must be greater accountability for police actions. Mr. Logan, who testified on the same panel, agreed that there must be accountability during the police investigation and for misdeeds on the part of participants. Mr. McCloskey, another member of the panel, complained that, with one exception, no one has been held accountable for their misdeeds in office in relation to wrongful convictions. Mr. Kyle recalled a number of prosecutions which were brought unsuccessfully against police officers in the United Kingdom after convictions were quashed in cases where it was determined that there were miscarriages of justice.

Michael Radelet is a Professor and Chair of the Sociology Department at the University of Florida in Gainesville. In 1979, the State of Florida executed its first inmate in 15 years, and that triggered an interest in the death penalty on the part of Professor Radelet. Since then, he has worked with death-row inmates and their families, including the last 38 inmates who have been executed in that state. He has published a number of books and articles on aspects of the death penalty. Since 1983, he and Professor Hugo Bedau have been researching erroneous convictions in homicide cases. For that work, Professor Radelet received the Criminologist of the Year award from the Society of Criminology. I found his evidence impressive. He, too, should be commended for his important work in this area. In his research, he is interested only in those cases where the accused is factually innocent. Since 1987, he and his associate documented 350 American cases that occurred in this century. Of those, 326 cases were erroneous convictions for homicide, and 24 were cases where the defendant had been convicted of rape and sentenced to death. He testified that these cases probably skim the tip of

an iceberg; there are many more cases that his research has not been able to document. In 1992, the number of such cases was expanded to 416.

Four hundred and fifteen persons have been executed in the United States since 1972. Professor Radelet gave evidence that during the same period, 72 persons were released from death row because of doubts about their guilt. No state has ever admitted to executing an innocent person. He has found that commonly, in cases in which wrongful convictions occur, the accused tend to be easy targets: they are poor, coloured, do not speak English, or are foreign nationals. That is, they are 'outsiders' in a community and may be victims of xenophobia. They may look a little 'weird' or perhaps they are 'hippies.' According to Professor Radelet, '[r]ich people do not go to death row in America.' In the cases he has researched, he concluded that one has to be incredibly lucky to have one's case reviewed and overturned. It is usually due to the dogged efforts of a person such as an attorney, prosecutor, news reporter or a police officer who has doubts about a conviction, or a television program like '60 Minutes.'

Professor Radelet testified as to the common factors which, in his opinion, result in wrongful convictions:

- Police error. The police suppress exculpatory evidence from the prosecutors. Or the police extort a confession from the accused. Or the police may engage in 'tunnel vision'. He gave some examples of this. Sometimes tunnel vision may lead to the real culprit not being apprehended. It is most often found in highly publicized cases, because there is pressure to find and charge someone. In such cases, the investigation's focus may be on a person who is relatively powerless. Evidence may be lost; it may be evidence that cannot be found or that someone conveniently hid.

- Prosecutorial error. This would include suppression of exculpatory evidence, or the prosecutors knowingly using perjured evidence or failing to question witnesses adequately.

- Witness errors. Perjury by prosecution witnesses is the number one cause of erroneous conviction in homicide cases. It is especially problematic if the witness is a jailhouse informant or someone who has pending charges and, therefore, something to gain from his or her

perjured testimony. There may also be erroneous or misinterpreted evidence by expert witnesses.

- Misleading circumstantial evidence. It was a factor in 30 of the 350 cases researched by Professor Radelet. However, he found that it is not as prevalent as mistaken identity or perjury or police error in causing miscarriages of justice. He testified that in some of the cases involving circumstantial evidence, "[i]f the facts don't exactly fit, we can build a bridge that links certain known facts and jam those puzzle pieces together, even if they don't constitute a perfect fit."

- Incompetent defence counsel. Professor Radelet would recommend adequate legal aid funding for indigent accused in serious cases. But he would also recommend adequate staffing resources for prosecutors.

Again, a number of these identified causes resonant with those I have found in the Morin proceedings.

Counsel for AIDWYC also filed a schedule prepared by Professor Martin that summarized cases of wrongful convictions that have occurred in Canada, the United States and the United Kingdom and that were detailed in her study. AIDWYC has submitted that wrongful convictions are common occurrences with identifiable and redressable causes; they are not aberrations in an otherwise well-functioning criminal justice system. Counsel for AIDWYC also submitted that the conviction of Guy Paul Morin is not an isolated incident or aberration. He cited the paper prepared by Professor Martin as demonstrating that wrongful convictions occur internationally and submitted that the causes of such convictions reflected in these documents are also found in the evidence of the witnesses McCloskey, Logan, Hadgkiss and Radelet.

Counsel for the Ontario Crown Attorneys' Association questioned Ms. Martin on some aspects of the AIDWYC study, including the choice of particular cases cited and the types of inferences which could reasonably be drawn from the study. I am satisfied that the causes of wrongful convictions internationally, identified by Ms. Martin in her testimony and in the study, accord with the considerable body of systemic evidence available to me. I rely upon the study for the identification of causes of wrongful convictions

generally, rather than for any inferences which may or may not be drawn from the particular cases selected.

The Wrongly Convicted

AIDWYC also organized a panel of persons who had been wrongfully convicted of serious crimes; they testified about their experiences with administrations of justice in different jurisdictions and how it came to be that they were convicted improperly. They also gave evidence as to the effect of the convictions and their imprisonment on their lives and the lives of their families. Much of the evidence given by the participants at that panel was truly heart-rending.

The panel consisted of the following individuals.

Rubin Carter was a former champion boxer who in 1967 was wrongfully convicted of murder and sentenced to death in the State of New Jersey. Two witnesses claimed that they had seen Mr. Carter at the crime scene. In 1974, both witnesses separately recanted and stated that they had been pressured by police to give false testimony. They also said they had been offered inducements of $10,000 in reward money and promises of lenient treatment on criminal charges pending against them at the time; one of the witnesses had been a suspect in the murder for which Mr. Carter was convicted. The New Jersey Supreme Court overturned Mr. Carter's conviction, but he was again convicted after a second trial. In 1985, the United States District Court overturned the second trial conviction on the basis that the prosecution had committed "grave constitutional violations": the conviction had been based on "racism rather than reason, and concealment rather than disclosure." Mr. Carter served a total of 19 years in jail.

Rolando Cruz was wrongfully convicted of the murder and sexual assault of a young child and sentenced to death in Illinois in 1985. Some of the evidence against him came from three jailhouse informants, canine sent evidence, and forensic evidence that purported to link him to footprints found on the victim's door and near her home. He successfully appealed, but was again convicted after a second trial. He was granted a third trial in 1994. In 1995, DNA testing of semen found on the deceased's clothing eliminated Mr. Cruz as the assailant. Mr. Cruz was nevertheless forced to undergo a third

trial. He was acquitted of all charges, after having served over 12 years behind bars. Four of the police officers and three of the prosecutors involved in Mr. Cruz's case are currently awaiting trial on charges of, *inter alia*, perjury, conspiracy to commit obstruction of justice, and obstruction of justice.

David Milgaard spent 23 years in prison for the 1969 murder of Gail Miller in Saskatoon. A reference by the federal government to the Supreme Court of Canada resulted in the quashing of the conviction. He was not re-tried. DNA testing performed in 1997 on semen stains on Ms. Miller's clothing proved that Mr. Milgaard had not been the perpetrator. Some of the issues raised on behalf of Mr. Milgaard are similar to those arising at this Inquiry. After Mr. Milgaard was exonerated, Larry Fisher was charged with Ms. Miller's murder. He is currently awaiting trial.

Joyce Milgaard also gave evidence before the Commission. Ms. Milgaard is David Milgaard's mother. She worked tirelessly for her son's vindication, and made a valuable contribution to the evidence before me.

Joyce Ann Brown was unjustly convicted of aggravated robbery in which a murder occurred and was sentenced to imprisonment for life in Texas. The robbery was committed by two women. The police located a car believed to have been driven by the women, and in the glove compartment was a rental agreement made out to Joyce Ann Brown. Ms. Brown was later identified by the victim's wife as one of the robbers. The prosecution also relied upon the evidence of a jailhouse informant. A second woman, Renee Taylor, pled guilty to the robbery, but refused to incriminate Ms. Brown. Ms. Taylor was ultimately persuaded to provide enough information to enable her actual co-perpetrator, Lorraine Germany, to be identified. Ms. Germany looked very similar to Ms. Brown. It was also discovered that the Joyce Ann Brown named on the rental agreement was a different Joyce Ann Brown. Ms. Brown was released in 1989 after having served almost 9 ½ years in jail.

Patrick Maguire was one of the McGuire Seven, convicted of possessing explosives in 1976. He was 13 years old when he was arrested, and spent four years in prison for a crime he did not commit. The details of the case against Mr. McGuire and his co-accused are outlined in Chapter II. In brief, the prosecution relied upon scientific findings of minute traces of nitroglycerine allegedly found on the hands, under the fingernails or on the

gloves of the accused. A Commission of Inquiry ultimately found that the findings could have been contaminated, and that the scientists involved failed to disclose significant information to the defence.

Rick Norris was wrongfully convicted in Fergus, Ontario, of rape and was sentenced to 23 months in jail. He was convicted largely on the basis of the evidence of the complainant, who identified him as the perpetrator. Forensic hair and fibre evidence was also led against him. Mr. Norris never appealed his conviction, but his case was re-investigated after someone came forward alleging a Mr. Anderson had confessed to the crime. When the police re-interviewed the complainant, she advised that from the beginning she had told the initial investigators that her assailant was either Mr. Anderson or Mr. Norris, and that, to her, the two looked similar. This information was never disclosed to Mr. Norris' defence. Mr. Anderson was later convicted of the assault. At his sentencing, the Crown attorney advised the court that Mr. Anderson had initially been investigated as the assailant, but was cleared after his alibi had been confirmed. The rape occurred at midnight. Mr. Norris was arrested at 8:00 a.m. the same day. The police must, therefore, have investigated Mr. Anderson's alibi during those 8 hours. Mr. Norris' wife provided a complete alibi for Mr. Norris.

It is noteworthy that the perjured testimony of jailhouse informants contributed to the convictions in three of those cases.

I was particularly grateful for the contribution of these panel members. It was obviously painful for the panelists to re-live their experiences; unbearably painful for some. The injury done to their lives and the lives of their families was immense. Their anguish was patent and justifiable. They were all, however, obviously motivated by a desire to assist in redressing other wrongful convictions and preventing future miscarriages of justice. Patrick McGuire, for example, testified:

> [T]he judge, for eight weeks, listened, and as I thank you now for having us here, I thanked him, because he turned around at the end of the eight weeks, and he said, 'I have witnessed the worst miscarriage of justice ever inflicted on anyone in this country.' ... I just hope that yourself, Judge, and other distinguished people here who are listening, maybe you'd do the same thing. Maybe you can prevent — you can't help us so much, but there are so many other people out there.

Of course, in addition to the experiences of those panelists, there is the experience of Guy Paul Morin. He testified as to life in the Whitby jail, where he was incarcerated pending his first trial. To put it mildly, it was not a pleasant place to spend several months of one's life, particularly for a person who was innocent of any crime. After his acquittal was reversed, he spent 10 more days in custody there until he was released on bail pending his second trial. On July 30, 1992, after he was convicted of murder and sentenced to be imprisoned for life, he was detained, first in Millhaven and then in Kingston Penitentiary, where he had to cope in a terrifying environment for over six months. His description of life in Kingston was particularly moving. The Jessop killing and the subsequent investigations, arrests, imprisonments, trials, and appeals seriously affected his life and the lives of his family for over 10 years.

Richard Wintory

I have already referred to, and drawn upon, the evidence of Richard Wintory, a senior prosecutor from the State of Oklahoma, in the context of jailhouse informants. His evidence, presented by the Ontario Crown Attorneys' Association, was also relevant to the systemic causes of miscarriages of justice generally. As I reflected earlier, Mr. Wintory was a forceful advocate of the adversarial system as the most effective way to ensure that 'right prevails', that is, that the guilty are convicted and the innocent spared. In his view, false, inaccurate or misleading evidence may frequently exist. However, these do not cause miscarriages of justice. Miscarriages of justice are, instead, caused by prosecutorial failure to provide broad disclosure, ineffective assistance of defence counsel and the failure of a judicial function. Highly skilled adversaries, with adequate resources and appropriate disclosure, best prevent a miscarriage of justice.

The submissions made by the Ontario Crown Attorneys' Association relied, in part, upon Mr. Wintory's evidence. The O.C.A.A. submitted that wrongful convictions are aberrations and are not symptomatic of systemic problems in the administration of justice in Ontario. The Association further submitted that the greatest threat to the just determination of criminal law issues is a lack of adequate resources devoted to the prosecution and defence of the accused.

In addressing the causes of wrongful convictions, the O.C.A.A. submitted they can occur when the system breaks down, whether through

prosecutorial misconduct, defence misconduct, or judicial incompetence. They are the exception and not the norm. There will regrettably always be miscarriages of justice; the challenge is to create an environment in which they will be few and far between. The O.C.A.A. maintained that the prime complaint by the systemic witnesses concerned the lack of adequate disclosure from prosecuting authorities. The O.C.A.A. relies on the fact that Mr. Kyle pointed to non-disclosure as very much a feature in what he described as the 'blockbuster' cases of wrongful convictions in the United Kingdom. The O.C.A.A. submitted that there is not currently a systemic disclosure problem in Ontario. Accordingly, many of the systemic issues identified in the studies filed with the Inquiry are no longer causes for concern.

Survey of Defence Counsel

In Chapters II and III, I discussed the survey of Crown counsel conducted under the auspices of the Ontario Crown Attorneys' Association. AIDWYC conducted a survey of defence counsel on the subject of wrongful convictions. The survey was prepared and administered in large part by Professor Anthony Doob. Professor Doob is a Professor of Criminology and a former Director of the Centre of Criminology at the University of Toronto. He has written widely on many issues, including public attitudes towards criminal justice, and had previously testified as an expert witness on survey evidence in criminal cases.

The survey was sent to over 1,000 criminal defence lawyers (most of whom were members of the Criminal Lawyers' Association). 219 responses were received. Professor Doob testified that a 22 percent return rate was fairly typical for a survey sent without advance warning to its intended recipients.

The survey defined 'wrongful conviction' as "a case where you are satisfied that a factually innocent person has been convicted at trial for any of a number of reasons." It then inquired into several different issues: First, it sought information on numbers of wrongful convictions, asking the following question:

> How many contested trials can you identify which resulted in wrongful convictions, where the accused person you represented was sentenced to one year or more in prison?

The qualification as to sentence received was inserted to restrict responses to the more serious kinds of offences.

Second, the survey sought counsel's views on the factors which contributed to the wrongful convictions. Third, it asked whether the convictions were appealed, and if so, with what result. Fourth, it asked for counsel's opinions on various proposed reforms to address the issue of wrongful convictions (such as relaxing the rules concerning the admissibility of fresh evidence on appeal).[53]

Professor Doob candidly acknowledged that there were reasons why the survey's results should be approached with some caution. First of all, with a 22 percent return rate, one cannot know how the other 78 percent of the recipients would have responded. This means that less confidence can be placed in the precise numbers obtained in the survey than in the relative importance attributed to the factors identified as contributing to wrongful convictions. Second, the survey did not employ a methodology which allows one to ascertain how the respondents interpreted the questions asked. Third, the survey was a study of defence counsel, not a definitive study of wrongful convictions. As such, the survey only reflects the views of one interested party in the criminal justice process. Professor Doob pointed out, however, that there were reasons to believe that the responses were not simply self-serving diatribes from partisan defence counsel: the factors listed as contributing to wrongful convictions were very similar to those identified in the literature, there were no important differences between the factors listed by respondents who had also acted as Crown counsel and those who had not, and 42 percent of the respondents listed actions by the defence as one of the factors leading to a wrongful conviction.

Professor Doob commented on how he felt the results of the survey should be used:

> I think you have to see any piece of empirical work like this in a greater context. And so that, really, these are the views of defence counsel, they are clearly that they, as I've mentioned earlier, they don't seem to me to be terribly self-serving ones. But I think that what you

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[53] Other questions asked have limited relevance to my recommendations and are not summarized.

> have to do in interpreting these is to say: Do these look relatively familiar, is this another piece of evidence pointing in the same direction as other evidence that the Commission has heard?
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> And that, as with any single piece of evidence, if there's a single piece of social science evidence on this broad issue which points in a wildly different direction, I think you would have to look at that more carefully. If, on the other hand, what this survey shows is that it's the same kinds of factors that other methodologies are showing, then it seems to me that this is one more bit of a piece of the puzzle which may help the Commission think about the kinds of remedies that it might suggest.

Professor Doob reported that 99 of the 219 respondents (45 percent) identified one or more wrongful convictions. Forty-five percent of those respondents, in turn, identified more than one wrongful conviction. Professor Doob stated that even if all the lawyers who did not respond to the survey had never experienced a wrongful conviction (the most conservative estimate), it still means that ten percent of all lawyers had. Most of the wrongful convictions occurred in cases of homicide, sexual assault or robbery.

A number of different factors were identified by the respondents as having contributed to a wrongful conviction. Professor Doob extracted the top five factors in each of two categories: 1) Dominant characteristics of cases with wrongful convictions, and 2) Mistakes or misbehaviour of criminal justice officials leading to wrongful convictions. The results are reproduced below:

Dominant characteristics of cases with wrongful convictions	All Cases (99)	All Cases except sexual assault (64)
heinous crime with public/media pressure to charge/convict	35% (35)	34% (22)
eyewitness identification	30% (30)	47% (30)
accused was portrayed as being a bad, or strange, or unattractive person	52% (51)	45% (29)
demeanour or testimony of the accused	32% (32)	25% (16)
accused's prior criminal record	26% (26)	30% (19)

Mistakes or misbehaviour of criminal justice officials leading to wrongful convictions	All Cases (99)	All Cases except sexual assault (64)
perjured testimony of a non-police witness	41% (41)	31% (20)
police did not consider other possible suspects	25% (25)	34% (22)
police pressure on witnesses inappropriately affecting their testimony	37% (37)	39% (25)
judge showed prejudice against the accused or against the defence case	51% (50)	47% (30)
error in the application of the law by the judge	44% (44)	44% (28)

A little over half of the respondents identified a factor as the most important. For those respondents that did so, the trial judge showing prejudice against the accused or the defence case was most often cited, followed by perjured testimony by a non-police witness and police pressure on witnesses inappropriately affecting their testimony.

Professor Doob cautioned that any interpretation of the relative importance of the contributing factors must take into account the fact that the responses do not reflect how often a particular factor was present. For example, in 15 cases, inadequacies in forensic science was listed as a contributing factor to a wrongful conviction. The survey does not reflect, however, how often forensic evidence was at issue in the 99 wrongful

conviction cases. It could be that such evidence was at issue in only 16 cases. If so, forensic evidence might be more problematic than the raw data appears to indicate.

Information respecting the appellate proceedings which followed conviction was available for 91 of the 99 wrongful conviction cases. Fifty-five were appealed to a higher court.[54] Nineteen of these appeals were successful (in that a new trial was ordered or an acquittal entered), mostly based on traditional legal errors in process. Fresh evidence was cited in four appeals. Only one conviction was reversed based on the ground that it was an unreasonable verdict.

Six of the 36 unsuccessful appeals were then taken to the Minister of Justice for review. Only one was successful. In the result, 71 of 91 alleged wrongful convictions were left intact.

Counsel were asked for their opinions on possible reforms to address the issue of wrongful convictions. Of the respondents, 84.8 percent either moderately or strongly supported the option of relaxing the rules concerning the admissibility of fresh defence evidence on appeal; 94.9 percent moderately or strongly supported the option of broadening the powers of courts of appeal to order new trials in cases where there are doubts about the integrity of a conviction; 67 percent moderately or strongly supported the idea of establishing an independent tribunal to review cases of possible wrongful conviction.

(iii) Systemic Policing Evidence

Durham Regional Police Panel

During the systemic phase, the Durham Regional Police Services Board led important evidence as to existing and proposed police practices in Durham through a panel of senior officers. These officers were as follows:

- Sergeant Richard Sullivan. He has been a member of the Durham

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[54] In 96 percent of the cases, counsel recommended an appeal. The respondents indicated that twenty cases were not appealed either because the accused did not wish to appeal or did not have sufficient resources to do so.

Regional Police Service since 1977. Since 1988, he has worked in the Forensic Identification Unit, has completed the senior identification course at the Canadian Police College and has extensively lectured on forensic identification issues.

- Sergeant Thomas Hart was introduced in Chapter III. He became a member of the Durham Regional Police Service in 1979 and has worked, since 1993, in the Intelligence Branch, where he is responsible for investigative section and technical support.

- Sergeant Myno Van Dyke was introduced in Chapter III. He has been a member of the Durham Regional Police Service since 1973. He was previously a member of the polygraph unit, and is now a trainer at the Durham Police Learning Centre.

- Inspector Charles David Mercier. He has been a member of the Durham Regional Police Service since 1977. Until his recent promotion to the rank of Inspector in 1997, he was most recently the detective sergeant in charge of the Major Crime Unit. He has had considerable involvement with the major crime management system taught by the Canadian Police College, most recently as an instructor on investigative techniques and major case management.

Their evidence was complemented by Charles Lawrence, who was tendered by Detective Bernie Fitzpatrick as a witness. Mr. Lawrence has been a team leader and instructor on Police Leadership at the Ontario Police College since 1994, and assisted in redesigning the criminal investigation training program at the College. He is a former member of the Metropolitan Toronto Police Force. I considered his evidence and some others, not only on a systemic basis, but as relevant to the level of training available to Durham Regional police officers back in the 1980s and early 1990s.

Durham Police Learning Centre

In 1993, the Durham Police Learning Centre was opened. The Learning Centre is a continuing education facility located on the campus of Durham College. It is primarily devoted to training Durham Regional police officers in the skills and elements of effective policing.

Sergeant Myno Van Dyke gave evidence before me as to the development, structure and philosophy of the Learning Centre.

The Learning Centre was largely the result of the recommendations of the 1992 Report of the Strategic Planning Committee on Police Training and Education for the Police Learning System for Ontario. This committee made a number of recommendations to the Ministry of the Solicitor General on training of police officers in the province.

Sergeant Van Dyke testified that the Durham Regional Police Service has utilized many of the principles set out in the Report. (Not all police services have effected changes based upon the recommendations.) The Durham Regional Police Service recognizes that training involves the constant review and improvement of training methods. It subscribes to the principle of continuous learning, continually upgrading in a cycle of planning and preparation for the future of both the organization and its employees.

The Durham Regional Police Service Policy on Educational Training recognizes the need for new concepts and approaches in police learning. The policy encourages voluntary participation in ongoing learning both on and off the job. The policy seeks

> to promote and support a culture in policing that values continuous organizational and personal improvement. The service will foster the professional growth of its members by providing educational programs that will develop the skills, knowledge and expertise of its members.

Sergeant Van Dyke testified that it was not until 1993 and the opening of the Learning Centre that both a philosophical and financial commitment to learning was realized in Durham. In 1984, commitment to the Training Branch, as it was then called, was limited, consisting of one staff sergeant, assisted by a sergeant and one civilian, all of whom were also involved in recruiting. Most training officers were recruited from the field and had various levels of expertise. One week training sessions were conducted once or twice a year.

In contrast, the Learning Centre has a staff complement of 14: four staff sergeants, four sergeants, four constables, and two civilians. It is involved in the development and delivery of provincially mandated training,

mandated defensive tactics training and firearms re-qualification, and the hosting or presentation of courses which previously required attendance at either the Ontario Police College in Aylmer or the Canadian Police College in Ottawa. The Learning Centre's partnership with Durham College also provides the Police Service with access to resources not otherwise available to it.

The Police Service reimburses the costs of textbooks and 75 percent of tuition costs, subject to budget limitations. Ninety-five members are currently registered in a variety of night school programs during off hours. Many officers are working toward a degree in criminology through the university centre at Durham College.

In addition to providing educational courses itself, the Learning Centre is responsible for arranging for officers to attend at the Ontario or Canadian Police College or other educational facilities. The Police Service also enjoys a partnership with both Colleges enabling them to hold courses at the Durham facility. Sergeant Van Dyke explained that it is much more economical for Durham to bring instructors from the College to teach a large number of Durham officers than it is to send one or two officers at a time to one of the colleges. It is becoming more and more expensive to send officers on Canadian and Ontario Police College courses.

In 1997, the Police Service initiated a training program to provide mandated training prescribed by the Solicitor General in its Policing Standards Manual. Every member of the Police Service and many civilian personnel are now required to attend at the Learning Centre for two 12- hour training days, twice a year. The first day involves mandatory training in use of force and firearms. The second day includes the categories of first aid and CPR training as well as various other topics. Sergeant Van Dyke anticipated that 95 percent of sworn personnel would have completed this program by the end of 1997.

Sergeant Van Dyke stated that several areas of training pertinent to issues raised in the course of the Inquiry have also become components of the mandatory training program. These areas, identified in 1993, include report writing, standardized Crown brief preparation, modern interviewing techniques, videotaping of statements and crime scene preservation. The move toward mandatory training in these areas occurred after unsuccessful efforts in 1995 to provide training through a decentralized program whereby

selected officers from each platoon or unit received monthly training with a view to passing these learned skills on to his or her platoon.

A course on ethics in policing provided by Durham to its members over the last two years has also become a part of mandatory training. The course, designed to assist officers in ethical decision-making, is taught by one of four Durham members trained to instruct the program by representatives from various police services and the Southwestern Law Enforcement Institute. In 1998, a session on crime scene protection (for officers first on the scene) will be offered.

Some of the courses at the Learning Centre are taught by members of the Durham Regional Police Service. Approximately half of the students enrolled are officers from outlying, usually smaller, services. This is not only cost-efficient, it has enabled Durham and officers from other Services to obtain training they might otherwise have had to wait for. For example, due to space limitations in the forensic interviewing course offered at the Canadian Police College, only one Durham officer had been able to attend each year, if that. By conducting the course itself, Durham was able to train 10 of its officers at the same time. This arrangement also facilitates personnel exchanges with other police services.

Durham instructors provide training at police colleges throughout the province. Courses on various topics have also been offered by Durham Region to the policing community, Durham College students, high school students, and other interested groups at various facilities in the community, sometimes co-hosted with other police services. Judges and Crown attorneys have also assisted Durham personnel in training witnesses (for instance, nurses) how to present evidence in court. The Ministry has been very supportive of these programs.

Of course, I support wholeheartedly the existence of a well-resourced, mandated training centre for Durham officers. It is my hope, as well, that the lessons learned at this Inquiry will all be incorporated into the mandatory training of Durham officers offered through the Centre.

The Campbell Report

In 1995, The Honourable Mr. Justice Archie Campbell was appointed

to conduct a review of the investigation into murders and sexual assaults committed by Paul Bernardo. Justice Campbell released his report in June, 1996.

Justice Campbell concluded that the story of the Bernardo investigation was not one of human error or lack of dedication or investigative skill, but rather of systemic failure. He wrote:

> Because of the systemic weaknesses and the inability of the different law enforcement agencies to pool their information and co-operate effectively, Bernardo fell through the cracks.
>
> The Bernardo case shows that motivation, investigative skill, and dedication are not enough. The work of the most dedicated, skillful, and highly motivated investigators and supervisors and forensic scientists can be defeated by the lack of effective case management systems and the lack of systems to ensure communication and co-operation among law enforcement agencies.
>
> Some of the systemic weaknesses have been identified and corrected in Ontario through changes in investigative procedures and advances in the application of forensic science. Other systemic weaknesses urgently require correction in order to guard against a tragic repetition of the problems that arose in the Bernardo investigations.
>
> Ontario has, in its existing law enforcement agencies, the essential capacity to respond effectively to another case like this, but only if certain components of those agencies are strengthened and only is systems are put in place to coordinate and manage the work of the different agencies.

Justice Campbell recognized a need for a major case management system to respond to major and inter-jurisdictional serial predator investigations. The system must be based on cooperation, rather than rivalry, among law enforcement agencies. It requires specialized training, early recognition of linked offences, coordination of inter-disciplinary and forensic resources, and mechanisms to ensure unified management, accountability and coordination when serial predators cross police borders.

Reference may be had to the Report for a complete outline of the elements of Justice Campbell's recommended system. Major elements of the system, however, were described for the Commission by Dr. James Young, whose testimony was extensively noted in Chapter II. These elements are summarized below.

The Campbell Report recommended that joint investigations be coordinated by a Board of Directors, through an executive committee. The Board would be responsible for implementing the policies and maintaining the framework for joint investigations. The executive committee would be responsible for the triggering mechanism which launches a coordinated investigation in a particular case, and for providing the general oversight of specific investigations. Dr. Young explained that the committee would be comprised of individuals from various disciplines in order to bring a broader perspective to an investigation from start to finish.

Particular investigations would be run by a case manager. This person would be selected from a cadre of senior experienced criminal investigators. The case manager would be accountable to the executive committee, but would have control of day-to-day operations of the investigation.

The case manager would be assisted by a small inter-disciplinary advisory committee. Its members would not need to work full-time on the investigation, but they would have to be available as needed and sometimes for extended periods. The members of the committee would be selected to ensure a consistently high level of continuing technical, legal and forensic advice. Dr. Young explained that one of the committee members would be a scientific advisor who would liaise between coroners, forensic scientists and police to ensure that information is exchanged and the right tests are conducted in the right order. The role of scientific advisor was discussed in some detail in Chapter II.

The case manager would also be assisted by a small full-time support team. Depending on the investigation, the team would include a media officer, crime analysts, profilers, computer technicians, an office manager and clerical and financial staff.

Justice Campbell believed that it would generally be unproductive to merge two or more investigations. For that reason, he suggested that the

different investigations proceed separately, but in coordination with each other. The case manager would be responsible for ensuring that coordination. The separate investigations would be run by the lead investigators of the different investigations. Members of each separate investigation team would perform essentially the same functions with respect to each crime, but their work would be coordinated through the management team.

One of the key concepts of the case management system is that there need be standardized investigation techniques — the same processes and procedures used in each and every major investigation — because one can never know which investigations may later be linked. Dr. Young explained that there have been problems in the past when someone commits crimes in different jurisdictions, or different areas of a large jurisdiction, or even different types of crimes which are handled by different parts of the same police force. There have been problems with linking the crimes. Even after crimes are linked, problems arise because different investigators might be using different systems of investigation, or even just different computer systems. As such, it is important for investigators to be trained in the same method and to use standardized methods.

Justice Campbell also felt it was important for all the different police forces in the province to use the same computer software. This would ensure that all information about suspects, leads and tips can be put together in a form that is accessible by all investigators in all investigations.

Justice Campbell identified adequate training as a key element of the successful investigation of serial predators. He recommended that specialized training be provided to case managers in major case management, and local investigators in homicide, sexual assault and crime scene identification.

Dr. Young explained that the Campbell model contemplates that there will be ongoing case conferences between the various players throughout the investigation. Indeed, there is a person assigned to organize the case conferences. All this is done in order to ensure that information is exchanged, the right forensic tests are being done in the right order, and things are being delivered when they are meant to be delivered.

Dr. Young believed that the Campbell model will result in a better product for the prosecution, and a better use of resources. Critical aspects of

the system are the level of cooperation between the disciplines, the involvement of forensic and other scientists from the outset, and established standards as to how the investigation will be done.

Dr. Young believed that the Campbell model should be used in all major cases, whether linked or not.

I respectfully endorse the Campbell model and urge the continued movement to its earliest implementation in this province.

Durham Major Case Management

I am told that implementation of the Campbell model is about one and a half years away. Durham Police, however, already have a major case management system in operation. The system was described by Inspector Mercier.

The Durham Regional Police Service employs the principles set out in the Major Case Management Manual prepared by the Canadian Police College. The manual was prepared with the input of major crime investigators. It was first published in 1993 and is updated annually. It describes several investigative techniques and strategies which should be considered in major cases. The concepts described are not new, but the ideas had not previously been assembled in a single document.

A major case manager (team commander), a primary investigative team, and a file coordinator form an investigative triangle responsible for the direction, speed and control of the investigation. All three roles may be performed by one person. The Crown Attorney's office is the legal resource branch of the triangle. A direct link between the team commander and a media liaison ensures that the investigation is not compromised by news reports. Inspector Mercier stated that the most important aspect of the organizational process is flexibility in investigations.

The command triangle is responsible for advising the officer in overall command (the inspector in charge of the major crimes unit) as to the progress of the investigation and for identifying investigative needs. The officer in command is to ensure those needs are met and, as well, provide his or her input into the investigation.

Where the roles of the command triangle are performed by more than one individual, daily team meetings, or round table discussions, are held in the first few days of the investigation to apprise all members of the team as to the information coming into the investigation and to ensure that all understand the investigative plan and areas of importance. All members of the team will be advised and should attend these meetings. If attendance is not practicable due, for example, to an appointment out of town, that person will understand the need to bring himself or herself up to date on what took place. All participants have input as to investigative strategy.

In a large investigation, a primary investigative team may direct several investigative groups. For example, a crime scene manager appointed by the team commander would be responsible for ensuring that all proper police procedures are conducted at the crime scene with regard to such matters as security, forensic work and investigative needs.

The case manager is appointed by the inspector in charge of major crime on the basis of training and experience. He or she prepares an investigative plan, outlining the direction and size of the investigation, giving a brief executive summary of the investigation and a list of duties specified individuals are responsible for performing. The plan includes the resources necessary to the successful completion of tasks.

Durham has seven senior investigators trained in the case management process. The officers have completed the Major Case Management course conducted at the Canadian Police College. The three-week course is designed to train managers in the proper conduct of a criminal investigation of major incidents, and to provide a management system linking police organizations involved in the same investigation.

An individual may be identified as a "person of interest" to the investigation (for instance, persons on parole for robbery living in the area). If no link is established between that person and the offence, he or she remains a "person of interest." If a link is established, that individual becomes a suspect. The process of elimination begins with an interview to determine whether there is an alibi. If so, it is investigated. Physical evidence may be collected, including biological samples. The investigation's goal is to use every available method to clear that suspect, but in many cases elimination can only be done to varying degrees.

Policies are set out for crime scene examination. Uniformed officers accompanied by highly visible police vehicles are solely responsible for protecting the crime scene. A search plan governs any search process, with search teams supervised by a leader responsible for ensuring that officers understand what is being searched for and that a proper record is maintained. As much time is taken as necessary to do a proper job. It is becoming more common for searchers to wear decontamination suits. The process of applying for search warrants involves a warrant liaison officer trained in this area of the law and directly linked with the Crown Attorney's office.

Forensic experts from the identification section are responsible for collecting and recording evidence through photographs, videotape and diagrams. At times, scientists may attend the scene. Evidence is turned over to an exhibits officer who is responsible for the preservation, packaging, tagging, and continuity of exhibits. The exhibits officer turns all evidence over to the manager, often an identification officer. Exhibits are then listed by number according to category. Every officer at the scene must file a report setting out what transpired, including any unusual circumstances. A liaison with the pathologist will ensure the pathologist has a direct understanding of what is important to the investigation.

Properly briefed interview teams take statements from witnesses. A polygraph examiner, reporting directly to the command triangle, acts as a guidance resource over the course of the investigation. At times, a statement may be analyzed by the examiner, linked with highly trained personnel across the country.

Document exhibits turned over to the investigative team (for example, information turned over in the course of an interview) will be recorded as an exhibit and, unless forensic work is required, stored in the documentation file of the file management system. Each piece of tangible evidence is identified, preserved, and its continuity ensured.

A support service section provides information about the criminal process to the victim or the victim's family. A counseling branch will direct victims, families or community groups to professional support for further counseling. Sometimes a community liaison will be assigned to deal with the community's needs— not to provide updates as to the investigation, but to explain the police responsibilities.

Multi-jurisdictional Case Management

Durham uses a computer program developed in 1993 by the CPIC Advisory Committee called Violent Crime Linkage Analysis System ("VICLAS"). VICLAS analysis assists in the identification of linked crimes by storing standardized pieces of information about various investigations. VICLAS analysis in Durham is facilitated by either a Durham officer seconded to the Ontario headquarters for VICLAS in Orillia or another coordinator. Upon the completion of that officer's two-year secondment, Durham will have VICLAS knowledge within its own organization. Durham also has an officer assigned to the Major Crime Section who is responsible for the liaison of Durham Regional Police with the VICLAS unit in Orillia.

In multi-jurisdictional investigations, the command structure for a Joint Force Operation provides for partnerships with other police organizations to ensure all are following the same investigative plan and strategies.

Inspector Mercier testified that the Case Management Manual promotes partnership. It advises that the home police agency should maintain primary investigative agency status and "should not be spectators in [their] own communities." Inspector Mercier explained the underlying rationale is to preserve the community's faith in its police service. While the home agency should always have an active role, primary investigation status would be subject to ability and specialized training. The home police agency is a useful resource because they understand the backgrounds of individuals and the geographic problems within the investigation.

The officer in overall command of the lead agency would identify the major case manager who may not come from either of the partnership agencies, but would be appointed on the basis of expertise, capability, and experience. His or her function would be to administer and ensure that proper investigative practices are followed, but he or she would not take the case through the court process.

Inspector Mercier explained that while, traditionally, the lead agency is identified, in a homicide, by where a body is found, this is not operationally effective where the evidence is in another geographic location. He described a recent case involving a partnership between Durham Region and Sudbury Region. While the body was found in Durham Region, the incident occurred

in Sudbury. Durham Region provided resources to conduct the crime scene investigation and provide security:

> Our identification officers were sent in, specialists, scientists were brought in to assist us at that scene. We were responsible for the protection of that scene, but they were responsible for the investigation itself. The exhibits were turned over to them, all statements that were taken were turned over to them. They basically formed the command triangle, but we provided certain aspects of the investigation.

Inspector Mercier described the Campbell Report's recommendations dealing with multi-jurisdictional investigations as a welcome and clear direction on how police agencies should work together.

Peer Review

Inspector Mercier testified that peer review by independent consultants is becoming more common in complex cases. As a result of the Campbell Report, the Province of Ontario is developing a major case management unit which would identify case managers throughout the province. These individuals could offer input on new strategies and ideas. They may comment on investigative theories which have been developed in an unsolved investigation.

Inspector Mercier also described many occasions when a meeting was held early in the investigation with the Crown Attorney's office, the coroner's office, and the pathologists or scientists involved in the case to discuss the best process or test to ensure proper results are obtained.

Tunnel Vision

Inspector Mercier testified that tunnel vision will be dealt with through the use of independent investigative consultants, and investigative meetings which provide for input from all investigators, some very experienced, who will not agree with ideas which are totally wrong.

Commentary

I am impressed with the direction taken by the Durham Regional

Police Services Board, particularly respecting enhanced training for its officers and the creation of new models to structure major investigations. A number of the policies implemented or proposed by Durham address areas where failings in the Morin investigation have been identified: for example, the structure of the investigation, the isolation of investigative teams, the interplay with forensic scientists, quality assurance at the body site and the organized retrieval, documentation and preservation of original evidence.

I am also impressed with the approach taken by the Durham Regional Police Services Board throughout this Inquiry. The Board did not seek this Inquiry. It knew that the Inquiry would, in part, focus on any deficiencies in the Durham investigation — and do so in a most public way. Nonetheless, the Board has taken a very positive approach throughout. It has focused, through its counsel, on the systemic policing issues identified by this Inquiry. It has provided to Commission counsel, on an ongoing basis, the latest material from Durham bearing upon these issues. Inspector Brown was extremely forthcoming in acknowledging the shortcomings of the investigation. He was completely non-adversarial in his approach to suggested improvement. The Durham Chief of Police provided Guy Paul Morin with as gracious and sincere an apology as any offered at this Inquiry. All of this augers well for the enhancement of policing within Durham Region.

There is one concern which I express, both for the benefit of the Board and to explain the recommendations contained in this chapter. Many of the failings identified by me in the Durham investigation go to the heart of the police culture. An investigation can be perfectly structured, but flounder due to tunnel vision or "noble cause corruption" or loss of objectivity or bad judgment. Older techniques and thought processes are, at times, deeply ingrained and difficult to change. Police culture is not easy to modify. The failings which I identified were systemic and were not confined to several officers only. The challenge for Durham will be to enhance policing through an introspective examination of the culture. I am convinced that such an examination has commenced.

The York Regional Police Association expressed another concern. Put simply, it is their position that the commitment, backed by financial resources, shown in Durham to enhanced training and quality assurance has not been shown in York Region. I have referred to these submissions in Chapter IV. The challenge for York Region, and the Government of Ontario,

will be to demonstrate an equal commitment to change, again backed by adequate financial resources.

Additional Policing Witnesses

AIDWYC tendered three additional systemic witnesses, in addition to Mr. Hadgkiss, relating largely to policing issues. These were as follows:

- Jean-Paul Brodeur. He is a Professor at the School of Criminology and Director of the International Centre for Comparative Criminology at the Université de Montréal. He is an internationally recognized expert on policing and has been involved with a number of commissions of inquiry respecting policing issues. He is a member of the Discipline Committee of the Sûreté du Québec.

- Richard Ericson. He is the Principal of Green College, and a Professor of both Law and Sociology at the University of British Columbia. He is a past Director of the Centre of Criminology and a former Professor of Criminology and Sociology at the University of Toronto. Among his many published works are *Policing the Risk Society* (co-authored with Kevin Haggerty), and *Making Crime,* a study of detective work.

- John Briggs. He is outside counsel to the Department of Justice in Ottawa, specifically engaged to assist the Minister of Justice with respect to the applications under s.690 of the *Criminal Code*. In the past, he has worked as Special Counsel to the Assembly of First Nations and Special Advisor to the Law Reform Commission of Canada. From 1987 to 1989, he worked as Director of Research for the Royal Commission on the Donald Marshall, Jr. Prosecution.

Their evidence is referred to in the context of specific recommendations.

Panels of Senior Counsel

During the systemic phase, two panels were assembled of eminent counsel to address the issues raised at this Inquiry. Some of these witnesses have previously been introduced in this Report. Their evidence is referred to

in the context of specific recommendations.

Joint Ontario Crown Attorneys' Association and Criminal Lawyers' Association Panel

The following counsel appeared as witnesses on this panel:

- Sarah Welch. She has been a Crown counsel since 1980 and is the President of the Ontario Crown Attorneys' Association. She has formidable experience as a trial counsel.

- Steven Sherriff. He has been a federal prosecutor, the Senior Discipline Counsel for the Law Society of Upper Canada and an Assistant Crown Attorney in Brampton. He has lectured on numerous subjects and is regularly consulted by law enforcement agencies.

- David Butt. He is counsel with the Crown Law Office - Criminal in Toronto. He was called to the bar in 1989 and obtained his LL.M. from Harvard in 1989. From 1991 to 1993, he was research counsel to the Martin Committee and assisted Mr. Justice Martin in the consultation, research and drafting phases of the report.

- Lee Baig. He is a senior criminal defence counsel in Thunder Bay. He was called to the bar in New Brunswick in 1965 and in Ontario in 1968. He has been counsel in over 100 homicide cases and was a member of the Martin Committee.

- Bruce Durno. He is a senior criminal defence counsel, practicing in Toronto. He was called to the bar in 1976. He recently retired as President of the Criminal Lawyers' Association and has been a member of a variety of joint committees on issues relating to the administration of criminal justice.

The Ministry of the Attorney General Panel

The following counsel appeared as witnesses on this panel:

- Paul Culver. He is the Crown Attorney for the City of Toronto, responsible for the supervision of 77 Assistant Crown attorneys and

the prosecution of all criminal cases in the downtown Toronto area. He has extensive experience as a trial counsel and as a lecturer and trainer.

- Peter Griffiths. He is the Regional Director for Crown Attorneys for Eastern Ontario. He supervises 10 offices and 50 Crown attorneys, serving a combined population of several million people. From March to June 1996, Mr. Griffiths was the Acting Assistant Deputy Attorney General, Criminal Law Division.

- Dan Mitchell. In 1989, he became the Crown Attorney for the District of Thunder Bay, and in 1991 the Acting Director of Crown Attorneys for the Northwest Region, a position that he held for five and a half years. He has been a Crown counsel since 1980 and was a member of the Martin Committee.

- Lidia Narozniak. She is Crown Attorney for the Region of Waterloo. She was called to the bar in 1983 and worked as a prosecutor with the Hamilton Crown Attorney's office for fourteen years. She has been involved with the education committee of the Ontario Crown Attorneys' Association for nine years, and was the Associate Director for the Advocacy Course organized by the Ontario Crown Attorneys' Association every August.

- Paul Lindsay. He is Deputy Director, Appeals, of the Crown Law Office - Criminal. He was appointed to that position in 1991. He has general supervisory responsibility over appeals in the Crown Law Office, with the exception of Crown appeals. He was called to the bar in 1979 and has worked as counsel in the Crown Law Office - Criminal ever since.

- Dana Venner. She is one of five Deputy Directors of the Crown Law Office - Criminal. She was called to the bar in 1984 and has worked for the Crown Law Office ever since. As a Deputy Director, she is responsible for long-term strategic planning for the office. She has also been responsible for overseeing professional development and training of a designated number of counsel within that office. Ms. Venner was seconded to the Special Investigations Unit in 1995 and was the acting director of the S.I.U. for several months.

These panelists addressed a number of the specific recommendations which I have made in this Report. Before doing so, they provided an overview of the structure and supervision of the Crown Attorney system in Ontario, the organization and functions of the local offices and the Crown Law Office - Criminal, Crown screening of cases and evidence, the importance of prosecutorial discretion, Crown involvement in police investigations, development of Crown policy, and the educational programs available to prosecutors. This overview was reflected in the written submissions on behalf of the Ministry. Some of these submissions are reproduced here (citations omitted):

> **Managing the Crown System**
>
> In 1985, the criminal justice system in Ontario was managed by a single Director of Crown Attorneys who was responsible for the administration of 48 Crown Attorney offices in judicial districts across the province. This system provided for very little uniformity of practice in the Crown system. Policy formation for the administration of justice was largely left to local Crown Attorneys in a system that placed emphasis on the independence of Crown decision-making at the expense of public accountability. Divergence in application of policies at the local level led to inconsistent treatment.
>
> In 1987 the Honourable T.G. Zuber produced for the Ministry of the Attorney General the Report of the Ontario Courts Inquiry which recommended a dramatic re-structuring of the administration of justice in Ontario. Among the many changes which were implemented as a result of that Inquiry was the creation of a regional management model for the Crown Attorneys. The province was divided into 8 regions (reduced in 1996 to 6 regions) and a Director of Crown Operations was appointed for each. The principal responsibility of the new Directors was to manage the finances, human resources and legal issues in each region as well as to sit on a provincial management committee for the Criminal Law Division. Many of these issues were managed centrally prior to the change. The Directors were responsible through that committee for the formation and uniform application of criminal law policy.

The new structure was established in 1989 and continues to this day. In 1993, the first consolidated edition of the Crown Policy Manual (a copy of which has been filed with the Commission) was drafted and all policies were approved by the Attorney General. Thus a direct and substantive link between the Attorney General and his Crown Counsel agents was established, completing the transition from a highly decentralized system to a modern and accountable organization.

.....

The Nature of Crown Discretion

All Crown Attorneys are employed by the Attorney General and are administratively responsible to him or her. However, there appears to be a modern convention under which attorneys general rarely involve themselves in individual prosecutions.

.....

The decisions which fall within Crown counsel's discretion include:

- charge screening
- plea resolution
- providing disclosure
- taking over a private prosecution
- staying proceedings
- electing a mode of procedure
- determining what evidence to call at a preliminary inquiry
- determining which witnesses to call, and the order in which they will be called, at trial
- taking a position with respect to sentence
- determining whether to launch a Crown appeal

.....

Safeguarding the Exercise of Discretion - Guidance, Support and Management

i) The Crown Policy Manual

The policies contained in the Crown Policy Manual are

the Attorney General's instructions as to how his or her agents are to perform their duties.

A principal purpose of the Crown policy manual is to provide assistance to Crown Attorneys in the exercise of their independent prosecutorial discretion. Although it is largely legally-based, it also provides advice to Crown Attorneys about the relevant factors to be taken into account in making different kinds of decisions.

The policy manual has another very important purpose, which is to ensure that the exercise of discretion is transparent by providing the public with the broad criteria which govern any exercise of prosecutorial discretion. They also prevent the giving of secret and arbitrary instructions to prosecutors.

Finally, the crown policy manual supports a consistent approach to policy-making and implementation across the province.

The Crown Policy Manual is intended to be a living document. A permanent committee of Crown Attorneys with representation across the province has been established to conduct a review of the manual to bring it up to date with existing law and to identify issues with respect to which policy direction is required. This committee was created to update the Crown Policy Manual and to assist in the ministry's response to the recommendations of the Commissioner. This level of responsiveness is necessary in order to ensure that the guidelines reflect contemporary issues and concerns.

ii) Hiring of Crown Attorneys

In exercising independent prosecutorial discretion, Crown Attorneys are quasi-judicial officers as well as advocates. It is important that they be able to make common sense, independent judgements, that is, that they be neither too rigid nor too liable to be swayed by advocacy groups or public pressure. In hiring new Crown Attorneys, the most sought-after characteristic is therefore the capacity to form those judgements.

iii) Crown Training

The wide range of training opportunities available to

Crown Counsel is summarized in Exhibit 295. These opportunities include a week long "Crown school" for newly-hired Crown counsel specifically designed to assist them with the evidentiary and ethical issues inherent in the exercise of discretion. There is a three day spring program, a week long intensive summer program, training in specialized areas of Crown practice and training on new and emerging issues. These courses are considered to be a Crown counsel work assignment and attendance is therefore mandatory, subject to ongoing court commitments. Education panels frequently include, in addition to senior Crown counsel, defence counsel, legal academics, judges, medical personnel and forensic science experts. In addition, on-going education occurs at the regional level, supported by the Crown newsletter and by dissemination of new decisions and other material by Crown Law Office Criminal.

iv) Mentoring and Peer Review

Recognizing the complexity and competing pressures inherent in the exercise of Crown discretion, the Criminal Law Division has established a network of support for Crown counsel. In many offices, a senior Crown is appointed as a mentor to junior Crowns. As well, in each court location, Crown Attorneys are assigned a supervisory role over junior Crowns, to assist them in making decisions about, for example, sentencing range and the appropriateness of resolution discussions.

Recent changes to the law with respect to disclosure, and the implementation of charge screening, outlined above, have resulted in additional scrutiny of the exercise of discretion. Thus, as a case moves through the charge screening process, the disclosure stage, resolution discussions and ultimately a trial, the individual decisions of Crowns becomes subject to the review of others.

v) Performance management

As outlined above, the management structure of the Criminal Law Division has been significantly modernized in the past decade. There is now an enhanced capacity for accountability in the decision-

making of individual Crown counsel.

In recent years, Crown Attorneys have seldom been hired on a permanent basis at the outset. They are hired on contract, and the contract period becomes in effect a period of probation. As a result of the public forum in which Crown Attorneys do their work, management often receives feedback about the performance by Crown counsel in the execution of their duties. As well, all Crown counsel are subject to an annual performance evaluation. The managing Crown is therefore in a position to assess the actual performance of the Crown Attorney, to impose corrective or disciplinary measures or to elect not to renew the contract of a probationary Crown.

vi) The decision to appeal

The process for making decisions about Crown appeals has a number of built-in safeguards to ensure the responsible and independent exercise of Crown discretion. The decision to appeal does not lie with the trial Crown him or herself, but with the Director of the Crown Law Office, Criminal. This office is closely related to, but institutionally separate from, the regional Crown offices. As well, a proposal for a Crown appeal will not even be made to the Crown Law Office, Criminal without the scrutiny and approval of the Crown Attorney or regional director of the region responsible for the trial of the matter. Once the request reaches the Crown Law Office, Criminal, it is reviewed by at least three Crown counsel who provide written opinions about the whether an appeal should be launched. The Crown Policy Manual sets out the factors to be considered in determining the appropriateness of an appeal, and specifically addresses the deference to be paid to jury verdicts. The proportion of jury verdicts appealed has been consistently low.

Recommendation 73: Education respecting wrongful convictions.

(a) The Ministry of the Attorney General, in consultation with the Ontario Crown Attorneys' Association, should develop an educational program for prosecutors which specifically addresses the known or suspected causes of wrongful convictions and how prosecutors may

contribute to their prevention. This program should draw upon the lessons learned at this Inquiry. Adequate financial resources should be committed to ensure the program's success and its availability for all Ontario prosecutors.

(b) An educational program should be developed for police officers which specifically addresses the known or suspected causes of wrongful convictions and how police officers may contribute to their prevention. The Ministry of the Solicitor General should take a leading role in promoting this programing. This program should draw upon the lessons learned at this Inquiry. Its design should be effected through the cooperative assistance of prosecutors and defence counsel. Adequate financial resources should be committed to ensure the program's success and its availability for all police investigators, both new and established.

(c) The Criminal Lawyers' Association should develop an educational program for criminal defence counsel which specifically addresses the known or suspected causes of wrongful convictions and how defence counsel may contribute to their prevention. This program should draw upon the lessons learned at this Inquiry.

(d) The Centre of Forensic Sciences should develop an educational program for its staff, including all scientists and technicians, which specifically addresses the role of science in miscarriages of justice, past and potential. This program should draw upon the lessons learned at this Inquiry. Its design should be effected through the cooperative assistance of prosecutors and defence counsel. Adequate financial resources should be committed to ensure the program's success and its availability for all Centre staff, both new and established.

(e) Ontario law schools and the Law Society of Upper Canada, Bar Admission Course, should consider, as a component of education relating to criminal law or procedure, programing which specifically addresses the known or suspected causes of wrongful convictions and how they may be prevented.

(f) The judiciary should consider whether an educational program should be developed which specifically addresses the known or suspected causes of wrongful convictions and how the judiciary may contribute to their prevention.

There was widespread support for such educational programming. For example, the Durham Regional Police Service submitted as follows:

> The Durham Regional Police Service would welcome a recommendation for the development of a component in all criminal investigation and identification training courses dealing with wrongful convictions of innocent people, specifically identifying the known or suspected causes of such convictions and setting out the preventative measures that can be taken by the police to avoid them. The Durham Regional Police Service recommends, however, that any such component be carefully researched and developed so as to be pedagogically sound, and not simply an *ad-on* subject to which only lip-service is paid.
>
> .....
>
> The Durham Regional Police Service welcomes any recommendation this Commission may make to enhance police learning in Ontario, and in particular, recommendations which ensure that adequate financial and human resources are available to allow the entrenchment of police learning as a part of modern day policing in Ontario.

Inspector Mercier believed that police training should include a component on the known causes of wrongful convictions. Sergeant Van Dyke felt that it is an area which has not received the focus it deserves, and he is currently involved in developing such a program. He believed training in this area should be done at either the Canadian Police College or the Ontario Police College where adequate research can be conducted to ensure proper training.

<u>Recommendation 74:</u> Education respecting tunnel vision.

One component of educational programming for police and Crown counsel should be the identification and avoidance of tunnel vision. In this context, tunnel vision means the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one's conduct in response to that information.

The evidence demonstrates that 'tunnel vision' affected police and prosecutors in Mr. Morin's case. It is clear that tunnel vision is not something which is unique to the Morin case. Dr. James Robertson, a member of the systemic panel on forensic issues, testified that the wrongful conviction of Edward Splatt in Australia resulted from the police quickly focusing on Mr. Splatt and using a tunnel approach to the investigation, such that they did not look hard enough at alternative suspects. The Donald Marshall case in Nova Scotia is also a classic example of an investigation coloured by tunnel vision. Mr. Briggs testified that 48 hours after Sandy Seale was murdered, Mr. Marshall gave a statement to the police identifying the assailant and his companion. Independent witnesses had provided similar identifications. Other individuals witnessed events which did not implicate Mr. Marshall. This information was not pursued, however, because the lead investigator on the case had closed his mind to any suspects other than Mr. Marshall, and consequently discounted any evidence which did not fit that theory.

Mr. Sherriff accepted that tunnel vision is a factor in wrongful convictions and miscarriages of justice in general:

> Tunnel vision has got to be a factor. And I'm talking generically now, miscarriages at large. I don't know enough about this one [Morin] to comment; that wouldn't be right, anyway. But tunnel vision, and of course, that can come in many shapes and sizes. Tunnel vision in the investigation dooms us as prosecutors. If it hasn't been a searching investigation, we're getting fed certain data. Disclosure is the best antidote; the best remedy is disclosure.
>
> So I would say, it's mind set, and the only mind set that counts is the one that seeks the truth.

Professor Ericson suggested that the causes of tunnel vision are systemic and structural, ingrained in the police culture. Any solutions must aim to change aspects of the culture, perhaps through training specific to the danger and supervision of the substantive content and direction of the investigation.

Mr. Briggs testified that the problem of tunnel vision was indirectly addressed in the recommendations of the Marshall Inquiry with respect to training:

> I mean, indirectly there are a number of recommendations relating to training and the resources provided to police and the kind of training that they required. And certainly that's part of trying to address the tunnel vision problem, as sort of educating people to the importance and necessity of constantly questioning and re-examining, and so on.
>
> Q. Right. So training, sufficient resources, accreditation systems to make sure that smaller police forces meet central standards might all be recommendations that would indirectly get at the phenomena of tunnel vision, hopefully?
>
> A. Yeah, to some extent. I mean, that's a difficult one because it's a problem that we all face, I think, in the kind of work we do, and how you guard against it. It's an ongoing challenge. But just the study, for example, of cases -- be it Marshall or the current one that we're here for, by police forces, I think there's enough of these cases from our own jurisdictions and elsewhere in the world that taking a series of these and examining what happened, you know, when young police officers are exposed to this, I think ought to be very helpful in terms of their education process.

Inspector Mercier felt that tunnel vision was a training issue. Ms. Welch felt that it would be very useful for Crown attorneys to receive education on tunnel vision. She believed that joint educational programs with defence organizations like the Criminal Lawyers' Association would be particularly beneficial. Ms. Narozniak testified that avoiding tunnel vision is already an element of the Crown education program, although not identified as such.

Recommendation 75: Crown discretion respecting potentially unreliable evidence.

Various parties suggest that Crown counsel be mandated not to call evidence which they subjectively regard to be unreliable. A similar submission was put this way: Richard Wintory testified that the prevailing American view is that it is improper for prosecutors to call evidence unless, in the very least, they subjectively believe the evidence to be true. It is suggested that Ontario Crown counsel should be held to the same standard.

Other parties suggest that reliability is an assessment to be made by the trier of fact and is not to be usurped by Crown counsel. Unless the unreliability of a witness or witnesses demonstrates that there is no reasonable prospect of conviction, or unless evidence is known to be perjurious, Crown counsel should not usurp the trier of fact's role of assessing reliability by not calling relevant evidence.

In my view, the appropriate approach lies between these perspectives.

It is clear that Canadian prosecutors cannot call evidence known to be perjurious. No one suggests otherwise. The difficult issue arises where prosecutors have no confidence in the proposed testimony. They do not know it to be false, but have sufficient concerns about its reliability that they are not themselves satisfied that the evidence is true.

Canadian jurisprudence has never demanded that prosecutors be legally constrained from tendering testimony unless they believe it to true.

In Ontario, prosecutors are required to pre-screen criminal cases to determine whether there is a 'reasonable prospect of conviction.' Where there is no reasonable prospect of conviction, a case should not proceed. The evaluation of whether a reasonable prospect of conviction exists may require some preliminary assessment of the reliability or credibility of evidence, recognizing that the prosecutors generally have not heard the witnesses at that stage of the process.

This practice reflects the views expressed in the 1993 *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (commonly referred to as the Martin Report, named after its Chair, the Honourable G. Arthur Martin, O.C.,O.Ont.,Q.C., LL.D.). Apart from the limited assessment of the credibility of witnesses in determining whether a reasonable prospect of conviction exists, the Committee was of the view that the credibility of witnesses is generally for the trier of fact. As well, the Committee felt that it is generally inappropriate for the prosecution to turn on the prosecutor's personal feelings or opinion as to whether or not the accused is guilty:

> A prosecution clearly cannot commence unless an informant, usually a police officer, has reasonable grounds to believe, *and does believe*, that the accused

has committed the offence for which he is charged. However, after the information is laid, an important aspect of Crown counsel's prosecutorial responsibilities is to maintain an impartial independence from the police or other informant, and an objectivity with respect to the prosecution that the police may not have, due to their minds having been made up in the course of the investigation. As stated by one experienced Canadian prosecutor,

> In performing his or her "quasi judicial" role, the prosecutor must not be affected by personal *animus* towards the accused. During the prosecution process, Crown counsel is called upon to make numerous decision of crucial importance to the accused and the integrity of the criminal justice system. There is a danger that personal conviction concerning the guilt of the accused will cloud the prosecutor's ability to act as dispassionate and impartial decision maker.

If only those cases were prosecuted in which Crown counsel firmly believed in the guilt of the accused, the settled notion that "the purpose of a criminal prosecution is not to obtain a conviction" may well be compromised in practice by prosecutors who, having formed the opinion that the accused is guilty, would therefore see it as their duty to obtain a conviction. In the discussion of public interest factors that may affect the course of a prosecution which follows, *infra*, the point is made that a prosecutor's animus toward an accused person is irrelevant.

The Committee recognizes that there is support in the legal literature for the proposition that a prosecution should not be instituted or proceed where the prosecutor has a genuine doubt as to the guilt of the accused. Perhaps the most famous example is Christmas Humphrey's statement: "I have never myself continued a prosecution where I was at any stage in genuine doubt as to the guilt, as distinct from my ability to prove the guilt, of the accused." Certainly, Crown counsel with a genuine doubt as to the guilt of an accused is duty bound to carefully explore the reasons for that doubt as they might be revealed in the

> Crown Brief or investigative file, and to recommend any further investigations as appear necessary. Such investigations may demonstrate that it is necessary to withdraw the charge, or that it is not in the public interest for the prosecution to proceed. If, however, following such review and investigation, there remains a reasonable prospect of conviction, and if the prosecution is otherwise in the public interest, the prosecution should usually proceed. On the other hand, the prosecutor's belief in the guilt of an accused counts for nothing if, on the evidence, there is no reasonable prospect of conviction. (Citations omitted.)

It is my view that a *legal* requirement that prosecutors not call 'unreliable evidence' or evidence which they do not subjectively believe to be true would be uncertain, impossible to enforce, generate endless motions (as to whether the prosecutor truly believes his or her witnesses), inhibit (if not paralyze) the ability of prosecutors to conduct their work and make prosecutors witnesses in their own prosecutions.

However, I believe that many Crown counsel do (and should) exercise prosecutorial discretion not to call a witness whose credibility does not inspire confidence, even where there remains a reasonable prospect of conviction on the totality of the evidence. I am confident that the senior prosecutors who testified before me are very capable of exercising that kind of discretion, and have done so in the past, whether legally required to do so or not.

The exercise of that kind of discretion requires great independence and security. Complainants, victims, police officers and the media may be vocal in expressing their anger or concern if a prosecutor chooses not to call a witness due to doubts about reliability. The decision not to call a complainant for that reason may result in a complaint to the Ministry. The decision not to call a police officer for that reason is difficult, particularly in jurisdictions where prosecutors deal with the same officers on a daily basis.

The exercise of such discretion by a less senior prosecutor may be particularly difficult.

In my view, rather than impose more legal rules, the solution is to create an environment for prosecutors (particularly less senior prosecutors)

that supports them in the exercise of prosecutorial discretion not to call unreliable evidence. Police officers should be told that prosecutors must have the independence to exercise this discretion. The Ministry and supervising prosecutors must provide the strongest institutional support for the exercise of this discretion.

The Ministry of the Attorney General should amend its policy guidelines to strongly reinforce that it is an appropriate exercise of prosecutorial discretion not to call evidence which is reasonably considered to be untrue or likely untrue. Similarly, it is an appropriate exercise of prosecutorial discretion to advise the trier of fact that evidence ought not to be relied upon by the trier of fact, in whole or in part, due to its inherent unreliability. The Ministry should take measures, including but not limited to further education and training of Crown counsel and their supervisors, to ensure strong institutional support for the exercise of such discretion.

Recommendation 76A: Overuse and misuse of consciousness of guilt and demeanour evidence.

a) Purported evidence of 'consciousness of guilt' can be overused and misused. Crown counsel and the courts should adopt a cautious approach to the tendering and reception of this kind of evidence, which brings with it dangers which may be disproportionate to the probative value, if any, that it has. Crown counsel and police should also be educated as to the dangers associated with this kind of evidence. This recommendation should not be read to suggest that such evidence should be prohibited.

b) Purported evidence of the accused's 'demeanour' as circumstantial evidence of guilt can be overused and misused. Crown counsel and the courts should adopt a cautious approach to the tendering and reception of this kind of evidence, which brings with it dangers which may be disproportionate to the probative value, if any, that it has. Crown counsel should be educated as to the merits of this cautionary approach and the dangers in too readily accepting and tendering such evidence. In particular, where such evidence of strange demeanour is brought forward after the accused is publicly identified, Crown counsel, the police and the judiciary should be alive to the danger that this 'soft

evidence' may be coloured by the existing allegations against the accused. The most innocent conduct and demeanour may appear suspicious to those predisposed by other events to view it that way.

A significant part of the evidence advanced against Mr. Morin at the second trial consisted of 'consciousness of guilt' or 'demeanour' evidence, that is, evidence that he acted or reacted in a suspicious manner. I have found that much of this evidence was worthless.

Several courts and authors have commented on the problems with searching for indications of guilt in after-the-fact conduct of an accused person. The Court of Appeal for Ontario, for example, recently had this to say in the context of a discussion on the admissibility of 'consciousness of innocence' evidence:[55]

> The admissibility of after-the-fact conduct is not without its risks. There is always the danger that the trier of fact will read too much into that behaviour. Conduct, which is no more than usual, rash or thoughtless can take on an unwarranted significance when viewed in hindsight at trial. The danger that after-the-fact conduct will be over-emphasized by a trier of fact exists whether evidence of that conduct is offered by the Crown or the defence. That risk is best avoided by a judicious use of the power to exclude prejudicial evidence even though it has some probative value.

In *R. v. Campbell*,[56] Hall J.A., speaking for the British Columbia Court of Appeal, commented as follows:

> I believe that a trial judge should consider carefully whether it is really necessary, other than in relatively rare circumstances, to instruct a jury concerning this subject.
>
> .....
>
> Where there is evidence of a deliberate effort by an

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[55] *R. v. B.(S.C.)* (1997), 119 C.C.C. (3d) 530.

[56] Unreported, January 12, 1998.

> accused to cover up, to mislead investigators or to influence witnesses, then it may be appropriate to instruct the jury about the subject. In general however, I venture to suggest, that it is better, is possible, to avoid reference at all to the whole subject since it can be and often is a fruitful source of potential error. There can be a host of reasons why people may do stupid things after being involved in a traumatic experience. I have the impression that trial judges are now more frequently being asked to give and are giving instructions about certain evidence in a case being possibly indicative of a consciousness of guilt. It is a trend that is not, in my view, a happy one and I believe this should rarely be invoked as a possibility probative factor of proof of guilt. If the crown case is so tenuous that this sort of evidence must be relied upon, it is in many instances not much of a case.
>
> If the trial judge is of the opinion that such instructions are called for, there is something to be said for the use of the neutral language suggested by Weiler J.A. in *Peavoy*, namely, "after-the-fact conduct". It could be pointed out to the jury that certain after-the-fact conduct might lead the jury to conclude that it could be indicative of the involvement of the accused in criminal activity. If a person, subsequent to involvement in an allegedly criminal event, acts in a way that suggest culpability, then that may lead the trier of fact to infer that he or she is conscious of their involvement and of their guilt. What must be made plain to the jury is the concept that this is merely a piece of circumstantial evidence that may or may not have much probative force. Generally speaking, I should think that undue stress should not be laid upon it as a factor that could lead to proof of guilt concerning the offence charged or an included offence.

In an article entitled "Guilt and the Consciousness of Guilt: The Use of Lies, Flight and other 'Guilty Behaviour' in the Investigation and Prosecution of Crime,"[57] Andrew Palmer wrote:

> Guilty demeanour [as opposed to tangible guilty conduct] is both more difficult to define, and identify.

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[57] (1997), 21 Melbourne University Law Review 95.

Perceptions of guilt based on demeanour are likely to depend on highly subjective impressions which may be difficult for the witnesses to articulate, let alone convey to a jury. The greatest obstacle to the use of guilty demeanour, therefore, will usually be the difficulty of establishing that the accused did indeed behave in a way which might be thought consistent with guilt. Even if this can be established, however, the significance of the behaviour will often be fairly equivocal. It may, therefore, be difficult for the jury to eliminate possible innocent explanations for the behaviour. Because of this, guilty demeanour will usually provide a far less secure basis for an inference of guilt than the evidence in the other four categories of guilty behaviour.

.....

As a general rule, one would expect someone who has committed a crime - or at least a bloody one - to experience some sort of immediate psychological or emotional reaction to that fact. Birch, for example, has argued that '[f]ailing to show any emotion after committing murder is so unusual' that 'if the question is which of two mentally normal men committed a murder, evidence that one was upset afterwards ought to be relevant.'

.....

Another arguably relevant emotional response to an alleged crime occurs when the accused's behaviour and emotional responses depart from the behaviour and responses which would have been expected if the hypothesis consistent with innocence were true. For example, the idea that Lindy Chamberlain's failure to publicly cry over the death of her daughter Azaria meant she had probably murdered her, was based on beliefs about the ways in which bereaved others supposedly behaved.

.....

I would argue, however, that while departure from the stereotype might legitimately arouse the suspicions of investigators, an inference of guilt cannot be safely drawn from it ... The most that can be said is that the accused's emotional responses to the event appeared to

be unusual. Guilt would, of course, be one explanation for the apparently unusual nature of the accused's responses; but another equally plausible one would be the accused's *general* emotional responses or levels of expressiveness differed from the norm. Without recourse to a battery of psychological testing, or the admission of a host of evidence about how the accused had responded in other, comparable, situations (if indeed any could be found), it is difficult to see how the jury could ever eliminate this possible explanation.

.....

In a recent Canadian drugs case, for example, the accused's 'nervous reaction' was listed as one of the items of evidence against him:

> Officer Coderre, who knew the appellant, reached him first, took away his weapon and informed him that they wanted to question him in the context of their ongoing investigation with respect to marijuana plants in the area. In response to this, the appellant reacted nervously and told the officers that he was in the process of hunting, that he had done nothing wrong and he asked them to let him leave. [*R. v. Couture* (1995), 93 C.C.C. (3d) 540]

It is difficult to see how the jury could possibly have eliminated the many conceivable innocent explanations for the accused's alleged nervousness; and if the jury could not eliminate those explanations, then knowing that the accused reacted nervously could not have assisted them to make a rational decision about the accused's guilt or innocence.

.....

In the Canadian case referred to above, the supposedly unconvincing denial of guilt occurred in court, so that the jury would have been able to decide whether or not the denial was that of a guilty man on the basis of their own perceptions. In most cases, however, the unconvincing denial will have occurred out of court, and the jury would have to decide whether the denial was that of a guilty person purely on the

> basis of a witness' account of that denial. Yet the supposed difference between the denial of the guilty and the denial of the innocent clearly turns subtle nuances of tone and timing, matters which are particularly difficult to convey accurately to a court. I would therefore argue that an accused person's out of court denial of guilt, no matter how unconvincing it might have seemed to those who heard it, should never be offered as evidence from which the accused's guilt can be inferred. As Lowe J. said - with the addition by myself of the word parentheses - 'by no torturing of the statement "I did not do that act" can you (safely) extract the evidence "I did do the act"'.
>
> In summary, as diverse as the behaviour contained in this category is, it does tend to share the two following characteristics: difficulty in satisfactorily establishing the fact of the behaviour, and difficulty in eliminating any innocent explanations for it. These two characteristics mean the evidence of guilty demeanour should seldom, if ever, be admitted.

Demeanour evidence was advanced against Susan Nelles when she was wrongly charged with the murder of four infants at the Hospital for Sick Children in Toronto. In discharging Ms. Nelles at the preliminary inquiry, His Honour Judge Vanek found that no inference of guilt could be drawn from a doctor's evidence as to Ms. Nelles' demeanour:[58]

> Several ... items of evidence relate to utterances and conduct following closely after the death of baby Justin Cook on Sunday, March 22nd, at about 5:00 a.m. Dr. Fowler testified that he did not see Nelles that morning until he was about to leave the hospital; and that as he was leaving he saw Nelles sitting at one end of the desks in the nurses' station apparently writing up the final report in Cook's medical chart. He said he knew she had been involved with Pacsai and had given the digoxin before and was anxious to see what she looked like at this time. He glanced in her direction and said that she had a very strange expression on her face and no sign at all of grief. He said he thought this was very strange that this would be her appearance at a time such a terrible thing had happened. With respect, while it

[58] (1982), 16 C.C.C. (3d) 97 at 123-125 (Ont. Prov. Ct. (Crim. Div.)).

> appears that Dr. Fowler went to school with Nelles' father many years ago and may have had some isolated transactions with him since, he barely knew Susan Nelles, if at all; he knew nothing about her emotional range, her reaction to stress, or her manner of expressing her grief. I am unable to find any evidence of guilt from what a doctor thought from a passing glance was "a very strange expression" on the face of a young woman he barely knew, who had suffered a most harrowing experience, and was engaged in the very emotionally disturbing duty she was bound to perform of writing up the final death note as part of her other difficult duties on the occasion of the death of a baby in her care.

The New Brunswick Court of Appeal also commented unfavourably on determining credibility on the basis of demeanour evidence:[59]

> In determining credibility, the trial judge ... made the following comments:
>
> > ... certainly if the accused had not been near [M.] when he was alleged to have kissed her, he would have made this known to the police when questioned about the matter.
> >
> > Mr. [B.] also testified that he had never kissed a girl in his life, that he did not know what a passionate kiss was, and that if he had a girl-friend, he did not know if he would kiss her any differently from the manner in which he would kiss his mother. I find this evidence difficult to believe and rather preposterous.
> >
> > I think that even the most naive, sheltered and unworldly 17-year-old would know better than that.
> >
> > Most importantly I want to mention that in my opinion [he] lacked the sense of outrage while testifying concerning the allegations, which one would expect if he were the subject of fabricated allegations or innocently distorted memories. If the evidence in the question

[59] *R. v. B.(S.P.)* (1994), 90 C.C.C. (3d) 478.

> against him had been totally made up, one would have expected to see a young man much more upset and much stronger in his denials of the accusations.
>
> Again one would have expected a very strong denial from the accused had he not been kissing the young girl as alleged.
>
> .....
>
> I would refuse to determine the credibility of an accused person by relying on a stereotyped degree of reaction, outrage or denial that one subjectively might expect from someone who is falsely accused.

Two of the systemic witnesses before me warned of the dangers of demeanour evidence. Professor Ericson said:

> [I]t's highly problematic to make that kind of inference [of guilt] from expressions of human emotion or particular human actions. There can be very many inferences that are made, and very many different actions that are taken as a result of those inferences.
>
> I think what you're dealing with here is of course -- I mean, this is a basis of human culture and human judgment generally that we're constantly making these inferences in order to read the character of people and to take action in relation to people. When it gets into a very serious matter, like a serious criminal trial, of course, there should be much more vigilance over whether or not that kind of information is allowed to be admissible, or those kinds of inferences are allowed to be admissible. And I'm basically agreeing with what I take to be the basis of your statement, that it's just highly problematic, and certainly should not be a grounds for concluding that somebody was actually motivated by what you're inferring from the accused.

Mr. Brodeur also pointed out that demeanour is culturally sensitive. He cited the example of aboriginals in Australia. Non-aboriginal Australians can make hasty and erroneous interpretations of aboriginal behaviour. Aboriginal body language and behaviour is markedly different than that of non-aboriginals. Looking someone in the face, for instance, is a mark of

disrespect to the former and a mark of truth to the latter. Mr. Brodeur stated that aboriginals very often lose custody of their children because judges misinterpret their (apparently evasive) behaviour in court.

Recommendation 76B: Use of term 'consciousness of guilt.'

In accordance with the *Peavoy* decision, the term 'consciousness of guilt' should be avoided.

In *R. v. Peavoy*,[60] the Ontario Court of Appeal was critical of the term 'consciousness of guilt':

> In his charge, the trial judge used the term "consciousness of guilt" and that is the term which has been commonly used to describe this kind of evidence. As this court held in *R. v. White and Côté* (1996), 108 C.C.C. (3d) 1 (Ont. C.A.), leave to appeal to the Supreme Court granted June 19, 1997, [1997] S.C.C.A. No. 53, and as the trial judge stated, evidence of an accused person's acts following the crime with which he is charged should be considered together with all of the other evidence in determining whether the Crown has proven the guilt of the accused. The characterization of the conduct in question as evidence of consciousness of guilt isolates it from other circumstantial evidence. To encourage the trier of fact to consider after-the-fact conduct with other circumstantial evidence and not to isolate it, the use of more neutral terminology is desirable. The use of neutral terminology, such as the term, after-the-fact conduct, also avoids labeling the evidence with the conclusion which the jury might not wish to draw and is therefore more accurate.
>
> .....
>
> Evidence of after the fact conduct must be relevant to a fact in issue and it may be relevant to more than one fact in issue in a trial. Like other circumstantial evidence, evidence of the after-the-fact conduct must be reasonably capable of supporting an inference which tends to make the existence of a fact in issue more or

[60] (1997), 117 C.C.C. (3d) 226.

less likely.

I respectfully agree with the Court's comments.

Recommendation 77: Admissibility of exculpatory statement upon arrest.

The Government of Canada should consider a legislative amendment permitting the introduction of an exculpatory statement made by the accused upon arrest, at the instance of the defence, where the accused testifies at trial.

Guy Paul Morin made a lengthy exculpatory statement to the police upon his arrest. The defence unsuccessfully sought to introduce the statement at trial. There is an issue, as I have earlier noted, whether that statement was made admissible by the Crown's closing address. Apart from that, the systemic issue raised here is whether such a statement should generally be admissible at the instance of the defence.

Subject to issues of voluntariness, common law 'dirty tricks' or non-compliance with the *Charter,* such a statement made by an accused is admissible at the instance of the prosecution. However, the prevailing view is that such a statement is not admissible at the instance of the defence. In *R. v. Campbell*,[61] Martin J.A. articulated the evidentiary rules which are said to compel that result:

> The refusal of the trial Judge to admit the evidence of other witnesses, whether in cross-examination or otherwise, of previous statements made by the appellant, involves two separate rules of evidence:
>
> I. The rule which precludes an accused from eliciting from witnesses self-serving statements which he has previously made.
>
> II The rule which provides that a witness, whether a party or not, may not repeat his own previous statements concerning the matter before the Court, made to other persons out of Court, and may not call other persons to testify to those statements.

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[61] (1997), 38 C.C.C. (2d) 6 (Ont. C.A.).

> Statements made by an accused which infringe Rule I are excluded as hearsay. The narration by a witness of earlier statements made to other persons out of Court appears to be excluded under rule II, because of the general lack of probative value of such evidence, save in certain circumstances, in support of the credibility of the witness. Each of the above rules is subject to well-recognized exceptions or qualifications, and there is some overlap, both in the rules and in the exceptions to them: see *Phipson on Evidence*, 12th ed. (1976), at pp. 650-3; *Cross on Evidence*, 4th ed., at pp.207-20; *Previous Consistent Statements* [1968] Camb. L.J. 64, by R.N. Gooderson.

In *R. v. B.(S.C.)*,[62] the Ontario Court of Appeal stated that the admissibility of after-the-fact conduct by an accused to support an inference that he or she did not commit the crime should be approached on a principled basis. If the evidence is relevant, its probative value is not substantially outweighed by its prejudicial effect and it is not excluded by some policy-driven exclusionary rule, the evidence should be admitted when tendered by the defence. The Court held that certain evidence, such as the accused voluntarily providing forensic samples to the authorities, in the particular circumstances of that case, should have been admissible on that basis. The Court also reflected as follows:

> We also reject the contention that evidence that an accused voluntarily provided samples and other material to the police for forensic testing cannot be admitted on behalf of the accused because it is well known that some guilty people have provided similar samples. This submission is akin to saying that evidence of flight should always be excluded because innocent persons have been known to flee the scene. The fact that the inference favourable to the accused is not the only available inference is no bar to admissibility.

At first blush, the Court's principled approach to after-the-fact conduct by the accused might provide support for a claim that an exculpatory statement upon arrest is admissible at the instance of the accused. Further, the Court's statement that "the fact that the inference favourable to the accused

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[62] (1997), 119 C.C.C. (3d) 530.

is not the only available inference is no bar to admissibility" might answer the suggestion that the admission of exculpatory arrest statements at the instance of the defence would favour unscrupulous accused who provide statements for tactical reasons.

However, the Court also said this:

> Evidence from an accused that he offered to take a polygraph test is, in effect, evidence that the accused previously made a statement which is consistent with his testimony that he did not commit the crime alleged. Generally speaking, evidence of a prior consistent statement is not admissible because it has very limited, if any, probative value and serves to expand unnecessarily the ambit of the trial inquiry: *R. v. Beland and Phillips* (1987), 36 C.C.C. (3d) 481 (S.C.C.) at 489-90; *R. v. Toten* (1993), 83 C.C.C. (3d) 5 (Ont. C.A.) at 26-27.

The inability of an accused to tender his or her exculpatory statements (subject to delineated exceptions, such as the rebuttal of recent fabrication, etc.) is found in American jurisprudence as well. The English courts, on the other hand, have taken a different approach. They have allowed defendants to introduce such statements as evidence of their reaction to being accused of a crime. In *R. v. Storey*,[63] Widgery J. wrote:

> The Court has given careful consideration to this important point ... A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial.

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[63] [1968] Cr. App. R. 884.

In *R. v. Pearce*,[64] the Court made clear that the principle was not limited to statements made immediately upon arrest:

> A statement that is not an admission is admissible to show the attitude of the accused at the time when he made it. This however is not to be limited to a statement made on the first encounter with the police. The reference in *Storey* to the reaction of the accused "when first taxed" should not be read as circumscribing the limits of admissibility. The longer the time that has elapsed after the first encounter the less the weight which will be attached to the denial. The judge is able to direct the jury about the value of such statements.

The only qualification on the principle was as follows:

> Although in practice most statements are given in evidence even when they are largely self-serving, there may be a rare occasion when an accused produces a carefully prepared written statement to the police, with a view to it being made part of the prosecution evidence. The trial judge would plainly exclude such a statement as inadmissible.

The Court of Appeal reiterated the point in *R. v. McCarthy*:[65]

> One of the best pieces of evidence that an innocent man can produce is his reaction to an accusation of a crime. If he has been told, as the appellant was told, that he was suspected of having committed a particular crime at a particular time and place and he says at once, "That cannot be right, because I was elsewhere," and gives details of where he was, that is something which the jury can take into account.
>
> Mr. Carlile pointed out that there had been an interval of three and a half days between the burglary and the date when McCarthy was interviewed by the police. That is so, and during that time McCarthy had an

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[64] [1979] Cr. App. R. 365.

[65] [1980] Cr. App. R. 142.

> opportunity of manufacturing an alibi. But the fact remains that when he was asked to account for his movements, he at once did so and invited the police to check what he had said.

The English rule is not dependent on the accused testifying in his own defence. Mr. McCarthy did not testify (or call any evidence), and yet the Court of Appeal held that the trial judge was wrong in refusing to permit the defence to introduce his statement made upon arrest. The Court suggested, however, that in such a situation a trial judge would be entitled to alert the jury to the fact that the accused has failed to support his exculpatory statement at trial.

The Morins contend that the admission of exculpatory statements, where the accused testifies in his or her own defence, advances the administration of justice:

> 5. The proposed recommendation to admit exculpatory statements would serve the cause of the administration of justice:
>
> a. It would enable an accused to demonstrate consistency in his defence. It would avoid a jury wondering what he may have said by way of explanation on arrest.
>
> b. It would cause defence counsel to be more prepared to encourage their clients to make statements on arrest. This would be of assistance to the police. An exculpatory statement, if true, can only be helpful to the interests of justice. An exculpatory statement, if false, may be able to be shown to be demonstrably false by the time of trial. Consequently, an exculpatory statement on arrest, whether true or false, will always assist a police investigation.
>
> 6. The preclusion rule is premised on a view that self serving evidence can deceive a jury. However, if the accused testifies, he can be cross-examined on his exculpatory statement. A jury can determine its truthfulness or falsity applying the same considerations as with any other evidence. If the statement is videotaped ... this assessment will more readily be able to be made. For example, the jury in Morin's case

> should have been permitted to hear everything he told the police on April 22 to 23, 1985. If the jury had heard his repeated and emphatic protestations of innocence throughout a long and tiring interrogation, it may have made the difference between conviction and acquittal.
>
> 7. In this context, it is wrong to compare the issue of admissibility of a previous statement of an accused with the issue of the admissibility of a previous statement of a witness. A jury will likely assume that a witness has been previously interviewed and given a statement consistent with his evidence in the absence of cross-examination that shows the contrary. Jurors are unlikely to make the same assumption for an accused because of the question they are likely to pose to themselves in their ignorance of the present law, namely: "Why did the defence not lead evidence of what his client said on arrest."

Some Canadian case law supports this view. In *R. v. Small*,[66] Forrestell J. held that the rule which prevents an accused from introducing his own statement into evidence violates s.11(d) of the *Charter*. In *R. v. Rozich*,[67] Hugessen A.C.J. accepted that the reasons for the rule disappear when the accused testifies in his own defence:

> [A]ll the reasons which justify the exclusion of evidence of exculpatory statements made by the accused disappear when the accused himself takes to the box. At that moment, the accused is then subject to full and searching cross-examination. It may technically be hearsay to show that on a previous occasion the accused said something similar to what he now says. I think that modern juries are intelligent enough to be able to give due weight to statements made out of court and I think that they are intelligent enough to be able to reach their assessment on the credibility to be accorded to unsworn out-of-court statements on the basis of their seeing and hearing and judging the accused when he or she is in the witness box before them.

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[66] (1991), 15 W.C.B. (2d) 51 (Ont. Ct. (Gen. Div.)).

[67] (1979), 10 C.R. (3d) 364 at 370 (Que. S.C.).

The Crown Attorneys' Association responds to this suggestion as follows:

> The O.C.A.A. respectfully submits that the current law as it relates to the admission of statements ought to remain unchanged. There is no sound policy reason to permit an accused person to lead self-serving statements either through cross-examination of Crown witnesses or in their own case in chief. Nothing heard by this Commission would suggest that the rationale for the rule against self-serving statements ought to be done away with. It is a rule which is time honoured and has not been identified as a cause of wrongful convictions in the evidence before this Commission. To that end, most recently, the Ontario Court of Appeal has affirmed the rule against the admission of self-serving statements [citing *R. v. B. (S.C.)*, *supra*, at paragraph 28].

Several of the Crown attorneys who appeared before me also did not support the idea of changing the law with respect to the introduction of exculpatory statements. Mr. Sherriff, on the other hand, was more receptive to the idea, acknowledging that a lot of the risk in allowing an accused to tender his or her own statement disappears when the accused testifies. However, he felt that if the accused was going to be allowed to do this, the Crown should be given the right to comment if the accused provided no statement upon arrest. Mr. Durno took exception to this latter suggestion, arguing that it would erode the right to silence.

In my view, there are policy considerations that arguably support the exclusion of the accused's exculpatory statements tendered at the instance of the defence, where the accused does not testify. However, there are compelling policy considerations, outlined above, for a reconsideration of the rule in circumstances where the accused is prepared to testify.

Recommendation 78: Admissibility of canine scent discrimination.

Trial judges should exercise great caution in permitting evidence of canine 'indications' to be tendered as affirmative evidence to prove guilt.

The evidence before me disclosed that Mr. Morin's wrongful conviction was not the only one in which this type of 'evidence' was

introduced. Mr. Cruz explained how it was used against him.

Sergeant Van Dyke, when testifying about the polygraph during the jailhouse informant phase of the Inquiry, said that the polygraph, like the police dog, is just an investigative tool. The dog does not testify. In the Morin case, however, the dog, in effect, *did* testify. I agree with Mr. Boley that such evidence should not generally be admitted in criminal cases as affirmative evidence of guilt.

Recommendation 79: Evidence of other suspects.

It may be appropriate to revisit the rule regarding the admissibility of evidence of other suspects having committed the crime, in light of the concerns raised at this Inquiry.

The threshold for the admission of evidence of other suspects is, arguably, higher than the typical threshold for the admission of defence evidence (probative value not substantially outweighed by prejudicial effect). The factum of the Attorney General in Mr. Morin's appeal against conviction, summarized the state of the law:

> Traditionally the appellate courts in most jurisdictions, have demanded that there be sufficient evidence connecting the third party to the commission of the offence prior to permitting the evidence to be adduced, no doubt in recognition for the significant potential for prejudice this type of evidence brings with it, namely by confusing the issues, distracting the jury, opening up numerous collateral matters, prolonging the proceedings, leading to speculation and conjecture, etc. In fact, in virtually every appellate authority that has permitted the admissibility of such evidence there has been substantial evidence linking the third party to the offence in question.

The Morins have submitted that the rules of admissibility should be relaxed. I take it that the Morins contend that, if there is some admissible evidence linking the suspect to the crime, the evidence should be admissible.

Mr. Gover provided *some* support for that position:

> I think that we have to find some way of fashioning a

> rule that would permit evidence of other suspects to be led, finding some appropriate threshold in order to prevent situations like this occurring, yes.

In my view, this is a difficult issue. Courts are appropriately concerned about the prolongation of the proceedings, and distracting the jury from its tasks. On the other hand, the existence of other suspects against whom a circumstantial case could be built (that is comparable in some respects to the case against this accused) may be relevant to demonstrate that the evidence is not consistent only with the guilt of this accused. The investigative treatment of other suspects, and the failure to clear those suspects adequately, may also be relevant to the quality of the investigation and therefore admissible, not as proof that a named suspect committed the offence, but as proof that the investigation (and therefore the evidentiary product of the investigation) is flawed.

My recommendation is not intended to resolve this issue but, rather, to reflect its importance. In my view, it is arguable (and I put it no higher than that) that the learned trial judge erred in his ruling referable to the admissibility of the evidence of other suspects.

Recommendation 80: Jury research.

The *Criminal Code* should be amended to permit research into the jury's deliberative process, with a view to improving the administration of justice.

An application was brought before me requesting that I summon the *Morin* jurors to testify at the Inquiry. As earlier indicated, I was of the view that this would be inappropriate. My decision was supported in the Divisional Court. I reflected, *inter alia,* that, in light of the confidentiality of their deliberations pursuant to the existing law, they should not be summoned to disgorge the content of those deliberations in a public inquiry, particularly where parties would seek to use their evidence to advance their respective positions on highly contested issues of credibility which could lead to findings of misconduct. However, I note the comments of Mr. Justice David Doherty in a speech presented at the 1996 Criminal Lawyers' Association Education Program:

> There is some empirical evidence which suggests that juries' comprehension levels are quite high. These

studies support the contention that our faith in the jury system is rooted in reality.

Many who operate within the criminal justice system, including judges, are convinced that the level of juror comprehension is woefully low. They argue that it is unrealistic to think that jurors understand much of what they are told about the law. Anecdotal evidence concerning the conduct of specific juries also affords some evidence that a significant number of juries do not understand what they are told. Inconsistent verdicts, unreasonable verdicts, and bizarre questions are not uncommon features of our system of trial by jury. There are also a few reported cases in which jurors' "confessions" as to their ability to understand the trial judge's instructions appear at the appellate level.

The social science information, however, provides the most disturbing view of the level of juror comprehension. Studies over the last 25 or 30 years, most of which have been done in the United States, indicate the following:

- There are high levels of misunderstanding among the jurors on basic issues such as the burden of proof.

- Judicial instructions do not significantly improve overall juror comprehension, although they do assist in some specific areas.

- Deliberations among jurors do not appear to significantly improve juror comprehension.

- Instructions which are presented in "plain English" and which take advantage of other aids (*e.g.* providing the instructions in writing) result in significant improvement in juror understanding.

It must be concluded that we cannot know at present the extent to which jurors do not understand the law as provided to them by trial judges. The "cone of silence" which descends upon the jury immediately after it returns its verdict precludes any meaningful assessment of their comprehension level. Furthermore, the general verdict delivered by juries provides no

> insight into the crucial question of whether the jury understood what they were told by the trial judge.
>
> There is strong reason to believe that we have a serious gap between what jurors are told about the law and what they understand about the law. Steps must be taken to determine the extent and cause of that gap. Three possibilities should be given serious considerations.
>
> - Section 649 of the *Criminal Code* should be amended to allow disclosure of information relating to proceedings of the jury in the course of their deliberations for the purposes of approved research ....[68]

I agree. One would hope that such research would enable the judiciary to respond to identified weaknesses in the jury system. Poor jury comprehension may favour the practice of providing a formula jury charge, in writing, to all jurors to assist in their deliberations. Research may demonstrate that juror comprehension would be improved if the judge's *opening* address more fully addressed the applicable law and the issues between the parties, if known. The appellate courts might revisit the division of labour between judge and jury. The uniform ability of jurors to take notes of the proceedings and a structured right to ask questions during the trial are ideas worth exploring. Our assumptions about the validity of traditional aspects of jury trials should be revisited, based on empirical research.

Recommendation 81: Outline of facts and personal opinions by the trial judge.

The Government of Canada, upon the recommendation of the Canada Law Commission, should consider whether the common law should be altered, through legislative amendment, to limit the ability of a trial judge to express his or her opinions on issues of credibility to the jury and further alter the obligation imposed upon a trial judge to outline the most significant parts of the evidence for the jury.

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[68] The other two possibilities referred to by Justice Doherty are that means must be put in place to lift the 'cone of silence' to permit inquiries into potential miscarriages of justice, and juries should be given more flexibility in the types of verdicts they are asked to return.

Trial judges currently enjoy a limited right to offer opinions on the evidence to the jury. The right is a controversial one. Professor Martin summed up the debate:

> On the one hand, the debate suggests that it's a help to a jury who might otherwise be confused. The counterbalancing argument is that the judge who herself or himself has concluded this is a guilty person will have a tremendous impact on a jury's view, unless you get a very independently-minded jury.

Some of the witnesses before me felt that it would be better if trial judges did not sum up the evidence in their charge to the jury. Mr. Gover, for instance, testified:

> I think that all experienced counsel will agree that the ability of a judge to sum up and to review the evidence, and indeed, in this jurisdiction the obligation of a judge to do so, is a potent device which can cause jurors to come to embrace the view taken by the judge of a particular case. And my view is that a better system, and this is despite all of the usual instructions to jurors that they not take the judge's view of the evidence as being determinative and that they're free to take their own view of the evidence, I make the point I've just made.
>
> So, in my view, the better approach would be to leave evidence entirely within the domain of the jury and permit jurors to make notes and then to rely on counsel to relate the aspects of the evidence to their respective cases.

The Runciman Report had this to say on the issue:

> The second consideration (the need to be fair to both sides) requires that judges should be wholly neutral in any comment that they make on the credibility of the evidence. It is appropriate for judges to identify for a jury questions, which are for them to decide, of a witness' credibility; it is inappropriate for judges to intrude their own views of whether or not a witness is to be believed. This is consistent with the need in some cases, for example where there is identification or confession evidence, for special guidance to be given

> as to its reliability. The precise balance between law and fact in a judge's summing up will be a matter for the judge to decide in the light of the facts of each case. We are well aware that summing up is an extremely difficult task, often calling for the exercise of great skill and judgment.

Probably the most compelling discussion of the issue came in *R. v. Lorentz-Aflalo*,[69] where Fish J.A. invited the Supreme Court of Canada to revisit the ability of a trial judge to comment on the evidence. He stated:

> *Epilogue: Is it appropriate to continue to tolerate that the judge give his opinion on the facts?*
>
> This is the question at the end of this study that I now ask myself. Is it useful or necessary for a jury to have the judge presiding over the trial inform them of his opinion as to the facts? As we previously saw, the courts consider it unacceptable that a judge give his opinion as to the guilt of the accused. In order to avoid this situation, would it be appropriate to abolish the rule which presently allows a judge to give his opinion on the facts?
>
> Turgeon J.A. in *Post and Gelfand, supra*, posed, it seems to me, the problem in all its acuity when he said:
>
> > When a judge has given his opinion as to the credibility of a witness and as to the credibility of an accused, the caution which he thereafter expresses to the effect that the jurors are not obliged to follow his opinion can never wipe out the effect that it has produced in their minds. *Why then give his opinion if the jury is not bound by what he said?*
>
> Turgeon J.A. was there inspired by the reflections of O'Halloran J. in *R. v. Pavlukoff* (1953), 106 C.C.C. 249, 17 C.R. 215, 10 W.W.R. 26 (B.C.C.A.), where he wrote in this regard, at p. 266:
>
> With great deference and I hope with proper

[69] (1994), 69 C.C.C. (3d) 230 (Que. C.A.).

> humility, in view of the eminence of some of the jurists who have given voice to *dicta* of apparently wide scope, I think it is appropriate to express a rationalized view that since the question of guilt is solely for the jury, a Judge under Canadian jurisprudence at least, who expresses his own opinions to a jury is doing nothing else than attempting to usurp the functions of the jury; the more so if strong and stubborn preconceptions are freely ventilated in the hearing of the jury prior to the conclusion of the defence case.
>
> If guilt is solely for the jury, and the Judge in law so instructs them, what occasion can there be for the Judge to express his own opinions as to factual matters of guilt.
>
> It seems an absurdity for a Judge after telling the jury the facts are for them and not for him, then to volunteer his opinions of facts followed then or later by another caution to the jury that his own opinion cannot govern them and ought not to influence them. If his opinion ought not to govern or influence the jury then why give his opinion to the jury.

At p. 267:

> There is every reason why the Judge should confine himself strictly to his own responsibilities and leave the members of the jury alone to carry out their responsibility. There may be a tendency among some Judges perhaps to feel constantly nervous whether a jury will bring in the verdict they may think the jury should bring in. But the law does not give the Judge such a superior position.

At p. 268:

> It is by no means to be assumed that a Judge's view of the facts is more sound than that of a jury with whose verdict the presiding Judge may disagree. A jury is not apt to reason in the abstract as if all men were alike, and attempt to force life into a plaster cast of law.

What could have been the historical reason for authorizing a judge to give his opinion on the facts? Was it that it was feared that a jury was so stupid and ignorant that it could not discern truth from untruth? This is what Rivard J.A. noted in a decision of our court where in conclusion to his observations on the comments of the judge in his charge, he wrote (*St-Pierre v. The Queen*, [1967] B.R. 695n):

> It is true that on several occasions in his summing up, the judge repeated to the jury that they were masters of the facts and they were entitled to have a different opinion than his own, but the whole of his charge meant the following to the jury: "You are entitled to not understand anything that I have told you, to act like complete imbeciles and to find the accused not guilty."

It has always appeared to me at the very least contradictory that on the one hand our system has confidence that a jury is capable of absorbing the most complex concepts of law in such a short time but that, on the other hand, it entertains doubts about it believing that a jury *alone* cannot decide what is a question of common sense (that is, the facts), by authorizing a judge to advance his own opinion.

Can one doubt for a single instant in our age, that a jury is not able to assess the credibility of witnesses and to decide on the facts the issue of a person's guilt or innocence?

.....

It would be appropriate to also note that in the majority of American states, a judge is not permitted to give his opinion on the facts. (William W. Schwarzer, "Communicating with juries: Problems and Remedies", Cal. L. R. (1981), p. 731; Wolchover, *ibid*, p. 784ff.)

.....

The constitutional right to a jury trial can only be given its true meaning if the verdict rendered is that of 12 jurors and not that of the judge and jury. In the

> continental law system, such as in France, for example, the judge deliberates with the jurors and even has a vote; our system is based on a clear division of roles; the judge is the umpire but also the professor of law or legal counsel and the exclusive responsibility for assessing the evidence and determining liability by the final verdict is for the jury.
>
> The reserve which is presently imposed on the judge to properly advise the jury that they are not bound by his opinion, has never appeared to me to be a sufficient guarantee. In this area, the issue is not whether the opinion of the judge influenced the jury, but rather whether, in the eyes of a reasonable person listening to the charge, it is probable that the jury was influenced.
>
> Some believe that this rule, at least in England, is linked to the very affirmation of an independent judiciary (McCardie, *The Law, The Advocate, and The Judge* (1927), pp. 25-6; P. Devlin, Trial by Jury (1956), pp. 118-20; quoted in *Due Process of Law* by Stanley Cohen, Carswell (1977), p. 339).
>
> .....
>
> With all due respect, I am far from sure that the independence of the judiciary in Canada would be jeopardized if the Supreme Court of the country decided to abolish this rule which allows a judge to express his opinion on the facts. The natural respect that a jury entertains for the judiciary arises from other things than the expression of an opinion that a judge may have as to guilt or innocence.
>
> Conscience of the community, the citizen's ultimate protection against oppressive laws, role in legitimizing the criminal justice system (see report of the L.R.C., *ibid.*, pp. 8-16), these are the major attributes of the jury which remains in our society a pillar of our democratic life. I consider that it would be to render it its full value not to attempt to invade what is its exclusive jurisdiction, that is, to decide on the facts in evidence. (Emphasis added.)

The jurisprudence has established limits to a trial judge's right to

comment upon the evidence. Many appellate courts have also assessed whether the presentation of the facts, even in the absence of express opinions communicated by the trial judge, lacked balance and prevented a fair trial. It was alleged on behalf of Guy Paul Morin in the Ontario Court of Appeal that Donnelly J. exceeded those limits established in the jurisprudence. The Court of Appeal never had to address that issue; without the benefit of full argument, I will not do so either. However, I can do no better than to say that I agree with Fish J.A.'s comments in their entirety.

Recommendation 82: Cautioning the jury that evidence may be coloured by criminal charges or other external influences.

Trial judges should be alert to the concern that honest witnesses' perceptions of events may be coloured by the existence of criminal charges against the accused, the notoriety of the crime which he or she faces, or the fact that the authorities, whom they respect, admire, and deal with, are supportive of the prosecution. Where this concern arises on the evidence, trial judges should instruct the jury to be mindful of potential colouration in assessing the evidence of these witnesses and that miscarriages of justice have been occasioned in the past due to honest, but faulty, accounts of witnesses whose perceptions were coloured by criminal charges or other external influences.

Recommendation 83: Treatment of the person charged in court.

a) Absent the existence of a proven security risk, persons charged with a criminal offence should be entitled, at their option, to be seated with their counsel, rather than in the prisoner's dock.

b) Crown counsel and the Court should be encouraged to refer to the persons charged by name, rather than as 'the accused.'

These recommendations were suggested by AIDWYC. It submitted that the way in which the system treats an accused person can be very important, especially in jury trials. The environment in which accused persons are tried must reflect that he or she really is innocent until proven guilty beyond a reasonable doubt.

The Morins joined in the recommendation that persons charged with an offence should not be referred to as 'the accused' but, rather, by their

name. They argued that use of the term 'the accused' is derogatory and designed to depersonalize the defendant from the rest of society; to create a 'him' and an 'us.'

Messrs. Sherriff, Durno and Ms. Welch could think of no reason why an accused person cannot be referred to by his or her name by the Crown and the Court during a trial. Ms. MacLean stated that if the term 'accused' carries a pejorative connotation, defendants should be referred to by name. Mr. Gover accepted that steps should be taken to ensure that an accused person is not depersonalized in criminal proceedings, but doubted that juries forget that the person on trial is a real live human being. Mr. Morin felt strongly that use of the term 'accused' was degrading and depersonalizing:

> I mean, when I spend hundreds and hundreds of hours listening to myself, and be - - and named, not Guy Paul Morin, not Mr. Morin, but "the accused", I mean the accused within the body of the court is present. Just reading my transcripts over the weekend from the first trial to the second trial, accused is present. I mean, without doubt, I mean, that was my role. I mean, it might be what I consider dehumanizing, it just is - - like degrading?
>
> It doesn't put you at par with your typical attenders that come to the court proceedings. You are in a class of your own. And to know that you're categorized as "the accused", it depersonalizes the - - obviously it did for me, the notion that I was really an entity of good. It's as though the accused is bad, no matter what. That's how I felt the perception was.

Professor Doob was not aware of any research which has shown that calling a defendant 'the accused' has been a factor in wrongful convictions. He was aware of a study, however, which showed that people become less punitive towards young offenders when they were referred to by their names.

Recommendation 84: Exercise of Prosecutorial Discretion respecting Fresh Evidence on Appeal.

The Morins suggest that the Crown Law Office - Criminal should always consent to the admission of fresh evidence that an in-custody informer has recanted and to an appeal from conviction being allowed, absent

exceptional circumstances, even where the informer has since recanted his recantation. Though this specific recommendation was not put to Paul Lindsay, Deputy Director of the Crown Law Office - Criminal, it seems clear to me, based on his testimony at this Inquiry, that he would contend that no such inflexible rule should restrict prosecutorial discretion. He explained that, in considering fresh evidence applications, his office applies the test set out by the Supreme Court of Canada in *Palmer and Palmer v. The Queen*.[70] It is his view that Crown counsel play an important role in putting the other side of any argument to the Court of Appeal, which can decide the appeal in its wisdom with the benefit of all possible arguments on the point. He sees much more scope for the exercise of an adversarial role (which is not to be seen pejoratively) than does counsel for the Morins.

I was impressed with Mr. Lindsay's integrity and professionalism; he was most articulate in describing the role of Crown counsel before the Court of Appeal. I believe that he, and counsel in his office, perform their duties with distinction. I also accept that Crown counsel will, on occasion, consent to defence appeals. I agree that the suggestion put forward by the Morins is overly restrictive and unnecessarily circumscribes prosecutorial discretion. However, in my view, there is some scope for the greater exercise of prosecutorial discretion to address fresh evidence in a less adversarial way.

The *Morin* appeal provides an example. The evidence accumulated post-conviction demonstrated that May was an unrehabilitated liar, whose recantations and recantations of recantations demonstrated his complete unreliability. There was no suggestion that Mr. Morin had influenced him in any way; everything May did and said after the conviction seemed to be a product of his own character flaws. Appellate Crown counsel did not challenge May's parents who described his recantations and their own son's unreliability.

Mr. Cook testified on the fresh evidence application as well. The prosecutors were advised that he was well regarded in his field, fair and objective, and indeed, the author of the study which was used to full effect by the prosecution in its closing address at trial. He unequivocally indicated that his study was misused by the Centre of Forensic Sciences and by the prosecution. He explained why. No serious challenge could be mounted to his

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[70] (1979), 50 C.C.C. (2d) 193 (S.C.C.).

testimony. In my view, it was obvious that his criticisms of the use of the Jackson and Cook study were well-founded. Indeed, all of the experts before me accepted his thesis that his study did not advance the prosecution case and was misused by the prosecution. While I am unable to conclude that Mr. Crocker told appellate counsel or Ms. MacLean that Mr. Cook was correct, he certainly did not advise them that Cook was incorrect (with the exception of Cook's conclusion that the fibre comparisons should not even have been attempted).

The case against Guy Paul Morin was far from overwhelming — we now know why. May and X constituted the only direct evidence against him. The hair and fibre evidence was regarded as the strongest evidence against him. That evidence was weakened by Mr. Cook's evidence. Mr. Morin had been acquitted by a jury once before. The appeal was of sufficient strength that a convicted first degree murderer was released on bail pending the hearing of the appeal.

Despite the honest reflections of appellate counsel that they have the discretion to do so (and have done so in other cases), I believe that consent to the admission of fresh evidence would likely only be given in the context of a murder case of this duration and profile in the most extraordinary circumstances (for instance, when DNA evidence exonerates the accused). I understand that the exercise of such discretion should not be lightly undertaken. As an appellate judge for many years, I am not insensitive to the weighty precedent for the Crown honestly and fairly articulating its opposition to the appeal and allowing the Court to decide. However, I am firmly of the view that the Ministry should rethink the scope of prosecutorial discretion on appeal so as to demonstrate less reticence in the exercise of such discretion in the future. It might well be that recognition of a broader scope for prosecutorial discretion would produce a different result on the same facts as presented in *Morin*.

No doubt, the Morins would contend that appellate Crown counsel are unlikely to exercise their discretion any differently than they presently do, absent mandatory directives. If the appellate prosecutors who appeared before me are representative of the Crown Law Office, I do not agree.

The Ministry of the Attorney General should amend the Crown policy manual to support the exercise of prosecutorial discretion by appellate Crown counsel to consent to the reception of fresh evidence on appeal

when the fresh evidence raises a significant concern on such counsel's part as to the innocence of the Appellant.

The Morins also suggest that the Crown, as Respondent, should generally not argue lack of due diligence in responding to a fresh evidence application, should be obligated to consult experts independent of the institution where their trial experts were employed, should disclose the opinions of the independent experts, and generally consent to the appeal where that opinion accords with the fresh evidence, unless the Director of Crown Operations is satisfied that the evidence would likely have had no impact on the result. In my view, the better approach is to reinforce and institutionally support the exercise of prosecutorial discretion with respect to these matters.

Recommendation 85: Crown discretion where significant concerns as to the appellant's innocence.

A similar issue arises in connection with the prosecutorial discretion to consent to a conviction appeal (in the absence of proposed fresh evidence) where the trial evidence raises a significant concern in the minds of appellate Crown counsel as to the innocence of the accused. Mr. Gover thought that the Crown Law Office would be open to the notion that suspicious verdicts should be set aside on consent of the Crown. He endorsed the idea of institutionalizing the practice. I concur.

The Ministry of the Attorney General should amend the Crown policy manual to support the exercise of prosecutorial discretion by appellate Crown counsel to consent to an appeal against conviction where a review of the original evidence raises a significant concern on such counsel's part as to the innocence of the Appellant.

Recommendation 86: Fresh evidence powers of the Court of Appeal.

Apart from the exercise of prosecutorial discretion, it was suggested by some parties at this Inquiry that the powers of the Court of Appeal should be expanded to more readily admit fresh evidence tendered by the accused/appellant on appeal, and to allow conviction appeals where the Court has a significant concern as to the appellant's innocence. I now address these issues.

The approach to fresh evidence tendered on a conviction appeal was articulated by McIntyre J. in *Palmer and Palmer v. The Queen:*[71]

> (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1965] 1 C.C.C. 142, 46 D.L.R. (2d) 372, [1964] S.C.R. 484;
>
> (2) the evidence must be relevant in the sense that it bears upon a decisive issue in the trial;
>
> (3) the evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

This analysis raises some difficulty where recantations are involved. A witness tendered by the prosecution at trial may subsequently recant. The recantation is tendered as proposed fresh evidence on appeal. The problem with its admissibility on appeal is not any lack of due diligence. The problem is that the recantation may be false and the original testimony true. Where the witness is an unsavoury one, it may also be suggested that the recantation is motivated by ulterior purposes. The witness may now favour the accused or, indeed, be influenced by him or her. The witness may no longer feel the need to assist the authorities, as any benefits have already been conferred. These and other considerations may cause the appellate court to conclude that the recantation is not reasonably capable of belief.

In *R. v. Big Eagle,*[72] the Saskatchewan Court of Appeal dealt with a recantation by an unsavoury witness. The Court stated, in part:

> The Crown has demonstrated that the circumstances leading up to his recantation do not satisfy the "credibility" test. We are in general

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[71] (1979), 50 C.C.C. (2d) 193 (S.C.C.).

[72] Unreported, December 11, 1997.

agreement with the following submissions in the Crown's written argument:

> 6. At this point the Appellant has to establish that the evidence given by Alain Germain to this Court is reasonably capable of belief. In our submission, he cannot meet this standard.
>
> Mr. Germain has told so many stories and flip flopped back and forth so often he can no longer be considered credible.
>
> .....
>
> In between, those two statements he has testified twice in courts, once at the Appellant's preliminary and once at this trial, and both times gave the same evidence implicating the Appellant. After the trial he gave an interview to Leslie Perreaux, a reporter with the Star Phoenix newspaper, in which he claimed he witnessed nothing at all and that he had lied in court. A transcribed copy of that interview was filed with the court. At the hearing of this application he testified that he had lied at trial, the preliminary hearing and to the police. During his testimony as well, he indicated he told several friends he lied. He also stated he told the Respondent's counsel on appeal, that he had told the truth at trial.
>
> 8. At this point, we submit the Appellant has very little if any credibility left and it would be impossible for this court to find his current statement to be in anyway credible. To the extent it is necessary to consider which series of statements reflect the truth, it should be noted that when Mr. Germain made his original statement, <u>he</u> called the police to make this report, they did not call on him. While he noted that he was in the area where the shooting took place and was worried about being suspected of the crime, there was no indication that the police ever considered him to be a suspect. To the extent that he had any

> such concerns, they arose entirely out of his own imagination.
>
> In this case it is only necessary to have regard for the third and fourth requirements of the "*Palmer*" test. Although we have found that the "fresh" evidence does not meet the third requirement, we also find that the fourth test has not been satisfied. When weighed against the entire evidence, this fresh evidence is not of such significance that it might reasonably have affected the verdict. Its exclusion would not result in a miscarriage of justice in the circumstances of this case.
>
> The crucial and compelling evidence linking the Appellant with this murder came from sources other than Mr. Germain — it came from his two close female associates. His friend and relative Tracy Big Eagle placed him at the scene of the robbery with his close male associate Ken Bronicki and gave detailed testimony about his subsequent confession to her. His common-law spouse Gina Big Eagle testified with respect to a "confession" on a separate occasion. It is a fair inference that the jury must have accepted this inculpatory testimony and disbelieved the appellant's denial of any inculpatory statements or participation in the attempted robbery. As well his friend, Beatrice Brittain testified as to his activities with Ken Bronicki. There was also testimony from an independent witness that the appellant and Ken Bronicki checked out the Tempo Service Station as a potential robbery site.

The Morins contend that *Eagle* illustrates the problem. Undue emphasis is placed upon the credibility of the recantation itself rather than upon the effect it inevitably must have upon any jury's ability to safely rely upon the witness' original testimony.

The Court reflects, as it was entitled to do, that there was a compelling case against *Eagle,* quite apart from the evidence of Mr. Germain. If the fact that Germain has since recanted could not reasonably be expected to have affected the result, then any appeal against conviction should have been dismissed. However, I am not sure that this is a completely accurate interpretation of the *Eagle* decision. It is well arguable that the Court accepted the Crown submission that Germain had changed his story so often, the recantation could have no credibility; having no credibility, the recantation was unlikely to have affected the verdict. The focus should not be

placed only on the believability of the recantation, but also upon the believability of Germain's original testimony, given the recantation. If the fact that Germain recanted, in the circumstances under which he recanted, could reasonably be expected to have affected the result, a new trial should be ordered whether or not the Court finds the recantation itself believable.

The *Morin* case provides an important illustration. May recanted after the trial. The recantation contained some allegations which were patently incredible. No one could find the recantations credible. Indeed, May recanted his own recantations. However, the inference which could be drawn from all of this is that May is an incorrigible liar, upon whom no reliance should be placed. In my respectful view, this evidence should have been admitted on his appeal (as it may well have been) and would have compelled a new trial. It would have been error to conclude that because the recantation itself was not credible, it should not have been received as fresh evidence.

I appreciate the judicial concern that verdicts not be too easily susceptible to attack based upon, for example, inducements offered to unsavoury witnesses to change their positions. The circumstances under which the witness recants (including any evidence of contact with the accused or inducements) may permit the Court to conclude not only that the recantation is incredible, but that the fact that the recantation occurred does not reflect back upon the reliability of the original testimony. Otherwise, a new trial may be compelled, unless the other evidence against the accused is overwhelming. Ultimately, the answer to the concern that recantations from unsavoury witnesses may too easily result in new trials is this: the Crown chose to call these kinds of witnesses and, with respect, must live with the consequences. The fact that such a witness' motivation has changed since trial may explain why he is no longer prepared to maintain the truth. However, it may also explain why, absent any self-interest, he is no longer prepared to maintain a lie. One theme, developed in this Report, is that one may never know which it is when dealing with jailhouse informants or others of similar ilk.

The application to tender Roger Cook's testimony as fresh evidence on appeal, earlier referred to, highlights a second systemic issue concerning the admission of fresh evidence on appeal: it relates to the 'lack of due diligence' requirement.

In *R. v. C. (R.)*,[73] the Court of Appeal for Ontario reflected upon the difficulty in applying this test. Carthy J.A. said this:

> The difficulty in applying the test literally is that in *McMartin, supra,* it was held that if point 4 is satisfied, lack of due diligence under point 1 should not stand in the way of the introduction of the evidence. This effectively makes point 1 redundant except perhaps as a balancing feature where there is uncertainty as to whether the evidence may be expected to have affected the trial.
>
> We would not suggest that lack of due diligence can override accomplishing a just result, but at the same time we would not like to see the requirements of due diligence watered down. The answer to the apparent conundrum may only be found in the totality of circumstances and a balancing of factors respecting the ends of justice.

The Crown, as respondent, would have had a compelling argument that Mr. Cook's evidence could have been obtained through the exercise of due diligence.[74] Notwithstanding judicial recognition that the 'due diligence' condition can be relieved against, the Morins suggest that there be a further relaxation (or even abolition) of the 'due diligence' requirement, to better prevent miscarriages of justice. The fact that inadequate representation has been shown to contribute to some miscarriages of justice (such as in the Donald Marshall case) heightens the concern that the 'due diligence' test could prevent important evidence from ever coming to light in a criminal case. The contrary position suggests that the present rule works well. Any further relaxation of the rule would cause an inordinate number of cases to be re-tried in the appellate courts. It could also be argued that the absence of any "due diligence" requirement would more easily permit counsel to reverse tactical decisions made at trial.

I favour a change to the present rule, which continues to address the

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[73] (1989), 47 C.C.C. (3d) 84.

[74] I understand that Mr. Morin would have contended, *inter alia,* that the study's real misuse only arose during the Crown's closing address. It is unnecessary for me to assess the merits of that or of the Crown's position.

concerns which motivate the 'due diligence' requirement.

a) In the context of recanted evidence, the requirements that evidence must reasonably be capable of belief to be admitted on appeal as fresh evidence and must be such that, if believed, it could reasonably be expected to have affected the result, should be interpreted to focus not only on the believability of the recantation, but also upon the believability of the witness' original testimony, given the recantation. If the fact that the witness recanted, in the circumstances under which he or she recanted, could reasonably be expected to have affected the result, these requirements are satisfied, whether or not the Court finds the recantation itself believable.

(b) Consideration should be given to further change the 'due diligence' requirement to provide that the evidence should generally not be admitted, unless the accused establishes that the failure of the defence to seek out such evidence or tender it at trial was not attributable to tactical reasons. This requirement can be relieved against to prevent a miscarriage of justice.

Professor Martin's views were similar to this recommendation:

> [T]he very limited and strict rule for the admissibility of fresh evidence should, in my view, be reconsidered. We have a real game theory operating in the adversarial system that can be very troubling, and indeed, have not very much to do with truth or justice. So if you have a bad lawyer who gave you bad advice, and a piece of fairly relevant evidence, should have been known to that bad lawyer who is giving you bad advice. The current rule is that unless it's the smoking gun, you can't later on raise it.
>
> There's a legitimate concern that somebody is going to manipulatively get, to use the vernacular, two bites at the apple. I would like to see that legitimate concern addressed directly, so that if there is an issue of fraud or manipulation of the process, then the fresh evidence is inadmissible. That is a legitimate reason to say: Sorry, you're playing games. It is not, however, serving justice to make that determination in the absence of fraud or manipulation.

Recommendation 87: Powers of a court of appeal to entertain 'lurking doubt.'

Consideration should be given to a change in the powers afforded to the Court of Appeal, so as to enable the Court to set aside a conviction where there exists a lurking doubt as to guilt.

The Court of Appeal's powers in addressing an appeal against conviction are set out in section 686 of the *Criminal Code.* Section 686(1)(a)(i) enables the Court to set aside a conviction where it is "unreasonable or cannot be supported by the evidence."[75]

It has been suggested, most particularly by the Morins, that appellate powers be expanded to permit the Court to set aside convictions where it has a 'lurking doubt' as to the guilt of the accused. This suggestion was resisted, most particularly by the Ontario Crown Attorneys' Association.

A consideration of this issue must start with a brief discussion of section 686(1)(a)(i), as interpreted by our courts.

In *R. v. Tat and Long*,[76] Doherty J.A. said this:

> Section 686(1)(a)(i) of the *Criminal Code*, R.S.C. 1985, c. C-46, requires that this court review a trial record to determine whether a conviction "is unreasonable or cannot be supported by the evidence". The section recognizes that there will be cases where despite an error-free trial and the existence of some evidence against an accused, appellate intervention is necessary to avoid an injustice. As Sopinka J. said in *R. v. Burke*, 105 C.C.C. (3d) 205 at p.216, s. 686(1)(a)(i) is:
>
> > intended as an additional and salutary safeguard against the conviction of the innocent.

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[75] Section 686(1)(a)(iii) also enables the Court to set aside the conviction where it is of the opinion that, on any ground, there was a miscarriage of justice.

[76] (1997), 117 C.C.C. (3d) 481 (Ont. C.A.).

The review directed by s. 686(1)(a)(i) is a limited one for very good reasons. The appellate process is not well suited to the assessment of the cogency of evidence led at trial. Appellate courts can claim no particular expertise in the secondhand evaluation of evidence. Appellate assessment of the factual merits of a case is not likely to be more reliable or accurate than the judgement made at first instance. Consequently, it is only in the clearest cases where the result at trial can be said to be unreasonable that appellate intervention is warranted. A verdict is unreasonable only where the appellate court is satisfied that the verdict is one that a properly instructed trier of fact acting judicially could not have reasonably have rendered: (authorities cited are omitted).

While recognizing the limited review permitted under s. 686(1)(a)(i), convictions based on eyewitness identification evidence are particularly well suited to review under the section. This is so because of the well-recognized potential for injustice in such cases and the suitability of the appellate review processes to cases which turn primarily on the reliability of eyewitness evidence and not the credibility of the eyewitness: (authorities cited are omitted).

.....

I have emphasized that the reasonableness review conducted under s. 686(1)(a)(i) is most effective when reviewing the reliability of eyewitness identification. Review under that provision is not, however, limited exclusively to questions of the reliability of evidence. The entire trial record must be considered and, to a limited degree, the credibility of witnesses must be assessed. In *R. v. Burke, supra* at 212, Sopinka J. said:

> Thus, although the appellate court must be conscious of the advantages enjoyed by the trier of fact, reversal for unreasonableness remains available under s. 686(1)(a)(i) of the *Criminal Code* where the "unreasonableness" of the verdict rests on a question of credibility.
>
> I acknowledge that this is a power which an

> appellate court will exercise sparingly.[77]

Appellate courts in Canada (and elsewhere) have wrestled with the distinctions between a verdict which is unreasonable and cannot be supported by the evidence, a verdict which is 'unsafe' and a verdict which leaves the appellate court with a 'lurking doubt.' The debate centres upon the appropriate scope of appellate review of guilty verdicts.

In *R. v. Malcolm,*[78] the Ontario Court of Appeal quashed a conviction registered by a trial judge on the basis that it was unreasonable and could not be supported by the evidence. Finlayson J.A. stated:

> The cases I have referred to emphasize the limitations in appellate jurisdiction, but are not that helpful in providing guidance as to when the jurisdiction should be exercised. I find some comfort in English decisions which point out that in the final analysis, the reaction of the court as to when an injustice has been done is a subjective one. While the language of the English Court of Appeal's empowering statute is different than our *Code*, the court asks itself what amounts to the same question: Is the verdict safe or unsatisfactory? I think that as appellate judges we will be expected to ask ourselves a similar question notwithstanding the absence of reversible error on the part of the trial judge.
>
> .....

Finlayson J.A. cites the English Court of Appeal in *R. v. Cooper*,[79] where Widgery J. said this:

> [W]e are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. *That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there*

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[77] See also, *R. v. Quercia* (1993), 60 C.C.C. (3d) 380 (Ont. C.A.).

[78] (1993), 81 C.C.C. (3d) 196 (Ont. C.A.).

[79] (1968), 53 Cr. App. R. 82.

> *is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.* (Emphasis added.)

After citing the English cases which track the language in *Cooper*, Finlayson J.A. states:

> I have found no reference to *R. v. Cooper* in any reported cases in Canada, but certainly the concept of an "unsafe verdict" has been accepted by this court and has been applied both in jury cases and in cases tried by a judge alone.

Finlayson J.A. ultimately concludes:

> I have considered the transcript of all the evidence and have read and reread the reasons of the trial judge. I am not satisfied that the verdict of guilty with respect to the armed robbery offences is a safe verdict. In addition to my expressed concerns about the quality of the identification evidence and the failure on the part of the Crown to make proper disclosure of Edwards' statement to the police, I am concerned that the appellant's undoubted guilt on the obstruction of justice and concealed weapon charges, coupled with his own evidence as to his life-style as a drug dealer, may have tainted him in the eyes of the trial judge to the extent, that he became a candidate for a crime he may not have committed. Giving the matter my fullest consideration, I think the verdict respecting the robbery counts should be set aside on the ground that under all the circumstances of the case it is unreasonable and cannot be supported by the evidence.

In *R. v. Guyatt*,[80] the British Columbia Court of Appeal framed the debate in this way:

> The function of this Court in considering an appeal which comes to it under s. 686(1)(a)(i) is prescribed by the test set out by the Supreme Court of Canada in

[80] (1997), 119 C.C.C. (3d) 304.

Yebes, supra. The concept of "unsafeness" is subsumed in the *Yebes* test. In *R. v. Irani* (27 September 1996), ... [reported 132 W.A.C. 203], this court concluded that the test in Canada as prescribed by the *Criminal Code* remains the test as set out in *Yebes*. In *Irani* Madam Justice Newbury said this in response to a similar argument (pp. 40-42) [at p. 227 W.A.C.]:

> Mr. Peck also sought to persuade us that as a result of the Supreme Court of Canada's recent decision in *R. v. Burke* (citation omitted), the discretion of appellate courts to set aside convictions under s. 686 (1)(a) has been broadened, perhaps as wide (he says) as to include a general ground of "unsafeness". (The word "unsafe" appears at p. 212 of the judgement of Sopinka, J. for the court in *Burke*). Here I infer that Mr. Peck takes the word "unsafe" to mean something more subtle or subjective than "unreasonable" — that is, to describe the situation where the appellate court is left with a "lurking doubt" as to the correctness of the conviction but cannot say no jury could reasonably have convicted. (The phrase "lurking doubt" is of course that of Widgery, L.J. in the seminal English case of *R. v. Cooper (Sean)*, (1969) 1 Q. B. 267 (Eng. C.A.))
>
> Mr. Peck also notes *R. v. Malcolm* (1993), 63 O.A.C. 188; 13 O.R. (3d) 165 (C.A.), where Finlayson J.A. for the Ontario Court of Appeal said he took "some comfort in English decisions which point out that in final analysis, the reaction of the [appellate] court as to whether an injustice has been done is a subjective one" (at 174). His analysis equated the discretion to overturn a conviction under s. 686(1)(a)(i) of the *Code* with the discretion given to the English courts of criminal appeal to set aside a conviction as "unsafe", notwithstanding the differences in wording between s. 686 and the comparable English legislation. The latter permits an appellate court to overturn where the verdict of a jury is found "in all circumstances to be unsafe or unsatisfactory."

> With respect, I am also unable to accept this argument. It is now beyond doubt that the test to be applied in Canada in an appeal under s. 686(1)(a) is whether a properly instructed jury could reasonably have convicted — not whether the appellate court, without having seen any of the witnesses, would itself have convicted based on the evidence it has read. The more stringent or objective test was repeated by the court in *Burke* and is consistent with its formulation in many earlier cases, including *R. v. Yebes*, [1987] 2 S.C.R. 168, 78 N.R. 351; 36 C.C.C. (3d) 417; 59 C.R. (3d) 108; 17 B.C.L.R. (2d) 1; [1987] 6 W.W.R. 97; 43 D.L.R. (4th) 424, *R. v. Burns (R.H.)*, [1994] 1 S.C.R. 656; 165 N.R. 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 29 C.R. (4th) 113; 89 C.C.C. (3d) 193, and *R. v. Corbett*, [1975] 2 S.C.R. 275; I N.R. 258; 14 C.C.C. (2d) 385. Thus while the word "unsafe" appeared in *Burke*, the absence of any indication that the court intended to move away from these authorities must in my view mean that the court was equating the term with "unreasonable" for purposes of s. 686.

That is the test we must apply in this case. Accordingly, I would dismiss the ground of appeal based on s. 686 (1)(a)(i).

.....

But counsel urged this court to consider an Australian case. *M. v. The Queen* (1984), 181 C.L.R. 487 (H.C. of A.) and the decision of the Ontario Court of Appeal in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193, which he said lent support to his submissions.

In *M. v. The Queen, supra*, the Australian High Court dealt with an appeal under s. 6(1) of the *New South Wales Criminal Appeal Act* (1912) which provided that the appeal of court could set aside a conviction if the court was:

> of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having

> regard to the evidence, or that the judgement of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice.

The section further provided that the court could dismiss the appeal if it considered that no substantial miscarriage of justice had actually occurred.

Mason C.J., for the majority, said this (at pp. 492-93):

> Where a court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence, it frequently does so expressing its conclusion in terms of a verdict which is unsafe or unsatisfactory. Other terms may be used such as "unjust or unsafe", or "dangerous or unsafe". In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s. 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, "none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand". *But a verdict may be unsafe or unsatisfactory for reasons which lie outside the formula requiring that it not be "unreasonable" or incapable of being "supported having regard to the evidence". A verdict which is unsafe or unsatisfactory for any other reason must also constitute a miscarriage of justice requiring the verdict to be set aside* ....
>
> [A]s the Court observed in *Davies and Cody v. the King*, the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there is a miscarriage of justice covers:
>
> > not only cases where there is

> affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For *it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand* because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or *because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled.* [My Emphasis.]

In other words, the appellant says, the verdict may be set aside where there exists "lurking doubt".

Brennan J., dissenting, said this (at pp. 502-4):

> A broader function for an appellate court has been suggested, namely, to determine whether "there is some feature of the evidence which raises a substantial possibility that the jury may have been mistaken or misled". In *Carr v. The Queen* I attempted to explain that that proposition, which owes it origin to a phrase in the judgement of the Court in *Davies and Cody v. The King*, cannot authorize the setting aside of a verdict as unsafe and unsatisfactory when the verdict is supported by evidence on which a jury, acting reasonably, could have convicted and when there is no blemish in the conduct of the trial.
>
> .....
>
> The difference between the two opinions in *M. v. The Queen* seems to turn on the degree of deference that the members of the court were willing to pay to the collective, unanimous decision of the jury. The Canadian approach recognizes the very different positions occupied by the trier of fact and the Court of Appeal. In my view the judgement of Brennan J., which mirrors the Canadian experience, is correct.

The same debate was renewed before me. The Ontario Crown Attorneys' Association said this:

> The O.C.A.A. submits that there is no demonstrated deficiency in the jurisdiction of the Court of Appeal to review unreasonable verdicts of guilt. The suggestion that the jurisdiction of the Court of Appeal should be expanded to permit acquittals based on "lurking doubt" suffers from imprecision and a lack of recognition of the essential role of non-verbal testimonial factors. Appellate courts glean their impression of a case based solely from the printed words of a transcript, devoid of the non-verbal testimonial factors which are vital to the determination of historical truth. Indeed, the significance of non-verbal testimonial factors is universally accepted. No party to this Commission has indicated what the substantive content is to the notion of "lurking doubt". The O.C.A.A. strongly recommends that this Commission reject any recommendation to alter the jurisdiction of the Court of Appeal. This is something which is better left to Parliament, after a full and complete review through the various committees in the House of Commons and the Senate.

The contrary view was expressed on behalf of the Morins in the following terms:

> [Section 686(1)(a)(i)] has been interpreted narrowly by the Supreme Court of Canada. As a general rule, the test applied has been whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered. In a rare case, an appellate court can look to issues of credibility where the assessment of credibility at trial is not supported by the evidence.
>
> The Ontario Court of Appeal has demonstrated a willingness to go beyond a strict interpretation of s. 686(1)(a)(i) in some cases, especially in identification cases such as *Quercia*. In *Malcolm*, Finlayson J.A. approved the English cases which permit the quashing of a conviction in a case in which there is a lurking doubt. He applied the same principle and quashed Malcolm's conviction. Counsel for the Morins know of only one other case in which the lurking doubt concept

has been referred to (and applied), the unreported case of *C*, a decision of Dubin C.J.O. in the Ontario Court of Appeal.

The fact remains that appellate courts are reluctant to broaden their powers to include the power to quash a conviction solely on the grounds that there is a lurking doubt as to its validity. If Morin's appeal had proceeded and if one leaves aside fresh evidence issues, the evidence of May or [redacted] would presumably have been sufficient in itself to take the Crown over the unreasonable verdict threshold. Appellate courts view themselves as courts of process, not courts to decide on issues of factual guilt or factual innocence. Radelet made the same point with respect to appellate courts in the United States:

> "Right now, with some minor exceptions, the appellate courts do not deal with factual guilt/innocence claims. They only deal with procedural issues, so [it's] felt that that should be expanded so that they would have power, at least in some cases, to re-examine guilt/innocence."

There seems to be no reason to suppose that a factually guilty person is more or less likely to have received due process than a factually innocent person. Hence, the chances are not high that a factually innocent person will more likely win his appeal than a factually guilty person. The questionnaire presented by Professor Doob on 'Defence Counsel Views of Wrongful Convictions' adds credibility to this analysis. Only 20.9% of the cases reckoned to be wrongful convictions by the respondents were quashed in the Court of Appeal.

This limited power of appellate review is, not surprisingly, a particular concern of AIDWYC. It is a concern shared by Guy Paul Morin who has often said that 'one Guy Paul Morin is enough'. Alastair Logan quoted the Justice Committee Report in his testimony. Justice recommended in 1989:

> "The powers of the Court of Appeal, Criminal Division should be reformed to enable it to quash a conviction where it has doubts about

> its correctness."
>
> A system of justice that places so much faith in the trial process is inviting wrongful convictions. The appellate process must be broadened to increase its ability to overturn cases in which serious doubts remain despite a conviction at trial.
>
> The Crown Law Office can play an important role in remedying wrongful convictions. If the Crown Law Office, after consultation with the trial Crown and a review of the written record, were to consent to appeals in which a lurking doubt remains, the administration of justice would be well served. The response of the Attorney General of Ontario's Panel to this proposal suggested an unnecessarily adversarial approach to appeal work. Involvement in the appeal process, a far more academic environment than the trial process, should enable Crown counsel to be more impartial and less adversarial. It is appreciated that the Crown's consent to an appeal may not necessarily result in the Court of Appeal quashing the conviction. However, the Court will always give due regard to a Crown request that the Court quash a conviction. [Citations omitted.]

A similar conflict appeared in the evidence of the systemic witnesses who appeared before the Commission. Mr. Butt and Ms. Venner adopted the position articulated by the Ontario Crown Attorneys' Association. Ms. Venner added that appellate courts should be more than simply uncomfortable with a verdict before they should be able to overturn it.

Mr. Baig and Mr. Durno believed that the standard for overturning a conviction should be relaxed. Mr. Baig said this:

> I think there are cases where you look at a transcript -- and I'm not talking about getting into credibility issues, but you look at a transcript and say: How could there ever be a conviction? And it goes beyond the current standard to say that, well, a verdict is sustainable. In my guts, that's not enough. Certainly, I would like to see in these cases, and again, I'm not talking about the appellant and Crown in all of these cases taking the position: Well, I'm going to play judge and jury. I think there are cases where ... look at it and just say: This

> isn't right.

Mr. Gover's opinion was as follows:

> Q. Do you think, sir, a lurking doubt notion ... might be a good extension to the court of appeal powers of review if we are to prevent as many wrongful convictions as possible?
>
> A. [O]bviously, it would help prevent wrongful convictions. Your question is whether it would be good to have appellate courts empowered to overturn convictions on that basis, and I suppose it would be. It would be a question of how we go about doing that.
>
> .....
>
> [I]f the appellate courts of this country are to be given a broader jurisdiction in relation to factual issues, there has to be a way of enabling appellate courts to deal with the evidence that would inevitably be involved in issues of that type.

This is a difficult issue. I appreciate that appellate courts are reluctant to usurp the triers of fact, who are said to be better situated to assess a criminal case, particularly one which spins on credibility. I have expressed this reluctance myself. Of course, there is some merit to this position. However, I am also of the view that an appellate court can overestimate the importance of seeing or hearing the witnesses. A substantial part of any assessment of credibility is the internal consistency of a witness' testimony (however well or badly that witness presents) and its consistency with other known facts. If the record produces a lurking doubt or a sense of disquiet about the verdict of guilt, should an appellate court not be empowered to act upon that sense after fully articulating those aspects of the record that have produced that doubt? No doubt, many appellate judges who sense a potential injustice do this — sometimes indirectly — through their determination of whether there was legal error at trial. With respect, a disquieting conviction may compel an appeal to be allowed on the most esoteric misdirection relating to a point of law that only legal scholars might appreciate. It is well arguable that a slightly broadened scope for appellate intervention permits the Court to do directly what some judges now do indirectly. It recognizes the most important, though not the exclusive, function of a criminal appellate court: to ensure that no person is convicted of a crime he or she did not

commit.

Recommendation 88: Crown appeal against acquittal.

The Government of Canada, upon the recommendation of the Canada Law Reform Commission, should study the advisability of amending the *Criminal Code* to provide that a Crown appeal against (a jury) acquittal is only to be allowed where the court concludes, to a reasonable degree of certainty, that the verdict would likely have been different, had the error of law not been committed.

The law with respect to Crown appeals against acquittal was set out in *Morin v. The Queen*:[81]

> The onus resting on the Crown when it appeals an acquittal was settled in *Vezeau v. the Queen* (1976), 28 C.C.C. (2d) 81, 66 D.L.R. (3d) 418, [1977] 2 S.C.R. 277 (S.C.C.). It is the duty of the Crown to satisfy the court that the verdict would not necessarily have been the same if the jury had been properly instructed.
>
> I am prepared to accept that the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty. An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree of certainty that the outcome may well have been affected by it. Any more stringent test would require an appellate court to predict with certainty what happened in the jury room. That it cannot do.

The Supreme Court of Canada held in *Morgentaler, Smoling and Scott v. The Queen*[82] that the Crown's right to appeal acquittals on any ground of law alone was not unconstitutional.

I accept that Crown appeals are not lightly undertaken against jury verdicts of acquittal in Ontario. Statistics provided by Mr. Lindsay show that

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[81] (1988), 44 C.C.C. (3d) 193 at 221 (S.C.C.).

[82] (1988), 37 C.C.C. (3d) 449 (S.C.C.).

between 1986 and 1997, only 34 appeals were taken from such verdicts.[83] I cannot speak to the situation in other jurisdictions.

In my view, there are some circumstances where it is appropriate that the Crown have available a limited right to appeal against a verdict of acquittal. An erroneous ruling as to admissibility which completely undermines the case available to the prosecution may be one example. The more difficult issue arises where an acquittal is sought to be overturned based exclusively upon alleged misdirection by the trial judge. Several arguments are advanced in this regard. First, there is little support in common law jurisdictions other than Canada for such a right. Second, cases in which a jury acquits are those where the likelihood is greater than any others that an innocent person may be wrongly charged. Third, there is a fundamental unfairness, analogous to 'double jeopardy,' in exposing an accused, acquitted after trial by judge and jury, to further jeopardy. Fourth, the retrial and conviction of a person previously acquitted by a jury undermines public confidence in the administration of criminal justice. Guy Paul Morin's case is said to provide the obvious example. Underlying these submissions is the suggestion that juries' verdicts of acquittal may often be unrelated to alleged misdirection in any event.

In my view, the matter deserves further attention and study. Despite the characterization by the courts of the Crown's onus as a "heavy one", the Crown need only demonstrate, to a reasonable degree of certainty, that the verdict of acquittal *may* have been different. It is my respectful view that the use of the term "may" substantially dilutes the onus upon the Crown, despite the words "to a reasonable degree of certainty". The formulation reflected in my recommendation addresses this issue.

Recommendation 89: Police culture and management style.

Police forces across the province must endeavour to foster within their ranks a culture of policing which values honest and fair investigation of crime, and protection of the rights of all suspects and accused. Management must recognize that it is their responsibility to foster this culture. This must involve, in the least, ethical training for all police

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[83] A substantially greater number of appeals (391) were taken from acquittals entered by trial judges sitting without a jury during the same period.

officers.

Professor Ericson suggested that one feature of police culture is a presumption of guilt, and that this feature is instilled in the general instruction and training of officers. Mr. McCloskey believed that police culture rewards the clearance of cases, and officers are under pressure to clear cases quickly. Mr. Hadgkiss testified that police officers are under enormous pressure to solve crimes in order to please their supervisors, politicians and the media. Mr. Logan argued that changing police culture is one of the most important conditions for preventing future miscarriages of justice.

Mr. Hadgkiss suggested that if values of integrity, commitment, excellence, accountability, fairness, and trust are strictly imposed and imbued in the culture, other desirable reforms will follow. However, codes of ethics, or values, must be meaningful in the sense that everyone has ownership in the code. The values must be practiced and encouraged at every opportunity. All training courses offered by the Australian Federal Police include a segment involving integrity and multicultural awareness.

Mr. Hadgkiss believed that an appropriate culture will allow officers to admit that they have pursued the wrong suspect:

> [I]n a hypothetical scenario that you portray of an investigator, a dogged investigator six months down the track realizing that he or she has the wrong suspect. Financial implications would weight heavily, that they would feel as though they'd let their hierarchy down, that their self-esteem would be at stake, that they would have to admit that they just made the wrong decision.
>
> But obviously, if the culture is right, and notwithstanding the amount of money that's been expended on a false trail, every effort's got to be made for investigators, because the cost would be far greater when their mistake is uncovered, which invariably, it will be. Even the most experienced investigators will come unstuck if they cling to that kind of — that culture or misconduct.
>
> .....
>
> [I]f the culture is right, and this kind of conduct is not condoned, management cannot be in a position to turn

a blind eye to investigators going horribly wrong.

In Mr. Hadgkiss' experience, management has tended to leave matters of misconduct to internal affairs. His service is trying to make management more accountable for the actions of its members.

The Durham Regional Police Service has seemingly taken some steps towards the creation of an ethical culture within its organization. A 'change team' has been assembled to develop a stated mission for the force, and a set of values by which it should be guided. In addition, early training in ethics is provided to all officers in order to guide their future conduct. Sergeant Van Dyke believed that there is no longer any code of silence within the force which protects unscrupulous officers.

Recommendation 90: Case management system.

Some of the major elements of the case management system have been outlined above. Dr. Young and Inspector Mercier highly approved of the system. It was also supported in the submissions of both the York Regional Police Services Board and the Durham Regional Police Service Board. In my view, such a system makes eminent sense and should be implemented as soon as possible. Durham also made some more specific recommendations, which I also adopt.

a) The standardized case management system recommended in the Campbell Report should be implemented as soon as possible.

b) Adequate resources should be made available to train sufficient senior police investigators to ensure that the case management system is used in all major crime investigations across Ontario.

c) There should be periodic review and updating of the case management system, incorporating best practices from around the world.

d) Audits should be conducted by 'peer review' teams to ensure that the case management system is being applied properly and consistently.

Recommendation 91: Minimum standards for police.

a) The Ministry of the Solicitor General should consider setting minimum provincial standards respecting the initial and ongoing training of police officers on a full range of subjects, relevant to the issues identified at this Inquiry.

In Chapter IV, I outlined the request from the York Regional Police Association for minimum and mandatory training standards for police. The Association argued that the only way to ensure adequate and up-to-date training is to create mandatory provincial standards. It was also suggested that mandatory training standards ensure that resources, financial and otherwise, are dedicated to such training.

The call for minimum and ongoing training standards was echoed by some of the witnesses before the Commission. Dr. Young, for instance, believed that minimum training standards were both necessary and beneficial, leading to efficiencies in investigation and better evidence.

Mr. Lawrence testified that training for police officers across the province is inconsistent and not standardized except in a few discrete areas, such as use of force. In my view, this situation is unenviable. Efforts should be made to ensure a minimum level of competence for all police officers. The Minister should consider the viability of setting training standards with respect to a more comprehensive range of subject-matters. If such standards are considered viable, specific funds should be earmarked for the necessary training.

b) The Ministry of the Solicitor General should consider setting minimum provincial standards for the conduct of criminal investigations, relevant to the issues identified at this Inquiry.

c) The content of policing manuals which guide Ontario police officers in the performance of their duties, such as the Canadian Police College Manual, should be revisited to reflect the lessons learned at this Inquiry.

Mr. Lawrence testified that policing in Ontario is mostly governed by non-mandatory guidelines. There are very few mandatory standards, although some are being developed to deal with five "core" functions: crime

prevention, law enforcement, assistance to victims of crime, public order maintenance and emergency response. These standards will be issued under the *Police Services Act*.

The Marshall Inquiry recommended that uniform guidelines for investigative work be developed.[84] Counsel for Detective Fitzpatrick suggested that a Policing Manual should be promulgated, containing mandatory prescribed standards, practices and protocols for policing. He made a number of helpful suggestions as to the content of such a Manual, which I note here:

Schedule A

This is intended to be a list of issues that should minimally be addressed in the recommended Policing Manual for Ontario.

A) RECRUITMENT, TRAINING, EDUCATION:

1. O.P.C. and other agencies be properly funded in order to provided adequate basic, intermediate and advanced training for officers in Ontario;

2. That local services (boards) be required to fund attendance at O.P.C. or other training facilities in accordance with standards of education and training prescribed;

3. That specialized training be mandatory before participating in major investigations (e.g. homicide, child abduction, sexual assault, missing persons, major case management).

B) CONDUCT OF INVESTIGATIONS:

1. a) Availability of exceptional investigative tactics (e.g. polygraph, profiling, surveillance, intercept authorizations, search warrants, DNA and General warrants);

   b) Criteria for resort to these measures;

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[84] Recommendation 71.

2. Interview Techniques/Tactics:

   a) Special Classes of Witnesses:

   Victims and families of victims, children and youthful witnesses, suspects, accused persons;

   b) Recording of Interviews:

      i) Criteria for use of audio or video tape;

      ii) Appropriateness of covert recording;

      iii) Exchange of information between interviewer and interviewee;

      iv) Need to have a complete and accurate record for disclosure purposes;

3. Assessment of Evidence:

   a) Reliability of expert opinions;

   b) Reliability of witnesses;

   c) Need to ensure evidence is free of contamination to ensure accurate forensic examinations;

   d) Need to confirm where possible the evidence/accounts of informers, suspects, accused persons or those who have an interest in the case;

   e) Need to limit the effect of bias;

   f) Criteria for determination of existence of Reasonable Grounds (charge) or Reasonable and Probable Grounds (warrants, etc.);

C) <u>OFFICERS PROFESSIONAL RESPONSIBILITIES</u>:

1. Need to ensure a professional and effective relationship with:

   i) Crown Attorneys and other counsel;

   ii) Other investigative agencies;

   iii) Forensic specialists;

   iv) Witness and victims;

   v) Judiciary.

2. Need to ensure confidentiality of information obtained during an investigation;

3. Need to be informed on matters of law and procedure and local rules and regulations;

4. Need to properly document/record all investigations undertaken and results obtained.

D) MAJOR CASE MANAGEMENT:

1. Need to create an effective internal organization so that investigative and reporting responsibilities are clearly defined;

2. Need to maintain an appropriate records management system;

3. Need to ensure effective sharing of investigation product between officers;

4. Need for affective (sic) coordination of police services in multi-jurisdictional investigations;

5. Proper preparation of a Crown brief and the importance of full disclosure to the Crown;

6. Need for defined criteria for identifying and investigating suspects.

E) INFORMANTS:

1. Need to recognize the inherent risks in resorting to

informants;

2. Need to have a local confidential registry of informants with access limited to assigned personnel, and Ministry oversight of use of informants province-wide;

3. Need to fully record all contacts with informants including all dealings regarding benefits sought, offered or provided directly or indirectly;

4. Need to confirm as far as possible the accounts provided by informants and to record all efforts in that regard.

I am not sufficiently familiar with the standards of conduct which are, will be, or could be, in place for governing policing in Ontario to endorse specific content, or a specific format, for such standards. I do recommend, however, that the standards be revisited in light of the issues raised at this Inquiry, and that appropriate amendments be made.

Recommendation 92: Structure of police investigation.

Investigating officers should not attain an elevated standing in an investigation through acquiring or pursuing the 'best' suspect or lead. This promotes competition between investigative teams for the best lead, results in tunnel vision and isolates teams of officers from each other.

Recommendation 93: Body site searches.

When conducting searches at a body site, police investigators should be mindful of the lessons learned at this Inquiry. Such lessons include the desirability of:

a) a grid search;
b) preservation of the scene against inclement weather;
c) adequate lighting;
d) coordinated search parties, with documented search areas;
e) a search plan and search coordinator;
e) full documentation of items found and retained, together with precise location and continuity;
f) adequate videotaping and photographing of scene;

g) adequate indexing of exhibits and photographs;
h) adequate facilities and methods for transportation of the remains;
i) decontamination suits in some instances;
j) resources to avoid cross-contamination of different sites. This may require that different officers collect evidence at different sites, where a forensic connection between the sites may be investigated.

I am satisfied that Durham Regional Police are now mindful of the appropriate conduct of a body site search.

Recommendation 94: Investigation of an alibi.

Where the defence discloses the existence of an alibi in a serious case, police should be encouraged to have the alibi investigated by officers other than those most directly involved in investigating the accused. Often, the investigation of an alibi need not draw extensively upon the knowledge of the investigating officers themselves. This recommendation permits a more objective, less predisposed approach to the potential alibi.

The Canadian Police College Manual instructs officers as follows with respect to the rebuttal of alibis:

> Identify potential alibi witnesses for all persons charged and proactively discredit their possible testimony well in advance of their court appearance. Your ability to immediately crush a misrepresentation in court will (or should) completely discredit the defense and the defense attorney while putting an end to many of the defense's shallow or illegitimate tactics.

Sergeant Van Dyke agreed that this was an unfortunate way of viewing potentially exculpatory evidence presented by the defence.

The Morins suggest that in serious cases arrangements should be made for officers who have not been involved in the investigation to investigate an alibi. Sergeant Van Dyke was asked to comment on this idea:

> SERGEANT VAN DYKE: Well, realistically, I don't think that's possible, because for most police services, and ours included, we just don't have that kind of

personnel, that we can have all these teams running around. But the problem I see with that is that -- again, Chuck can verify this in the homicide unit. In order for them to interview the alibi witnesses, I think they have to have a pretty extensive background of the case and know the facts to be able to either substantiate or approve otherwise.

Certainly, you know, the more independent you can be the better. And certainly that's a factor, but I don't think that that, in practical terms, would work.

MR. LOCKYER: But most alibi pieces of evidence, when you think about it, sir, what you really need to know is a synopsis of the crime and its time. That's really all you need, isn't it, in the normal course of events?

SERGEANT VAN DYKE: It depends. I think that there's a lot of variables there.

MR. LOCKYER: Take that as an average circumstance.

SERGEANT VAN DYKE: That was the average. I don't see any problem with doing that. I think that there's nothing wrong with having an unbiased opinion, and being more neutral than you can be, but I think my experience that any officers in homicide units or any officers investigating serious crimes are going to look objectively at it, hopefully. We've learned our lessons in the past, that if you develop tunnel vision, it's going to cause you problems. And I think that that message is fairly well articulated over the last few years, that we don't want to take those kinds of risk any more, and we're going to do our best to make sure that we have the right person.

Recommendation 95: Accountability for unsatisfactory police testimony.

If police give testimony found to be false or which Crown counsel reasonably considers to be unreliable, Crown counsel should report these matters to the Chief of Police for investigation. The Ministries of the Attorney General and Solicitor General must implement measures to ensure that these situations are reported to the Chief of Police for investigation, that such investigation occurs, and that the results of the

investigation are communicated to Crown counsel or to the Court.

Ms. Venner felt that the Crown attorneys are obliged to bring any concerns over the reliability of police testimony to the attention of the force of which the witness officer is a member. That includes ensuring that transcripts are provided to the officer's superior.

I am confident that the senior prosecutors who testified during the systemic phase of the Inquiry would have no difficulty in fulfilling this obligation. In practice, it may be more difficult for some Crown counsel, particularly less senior counsel, to report unsatisfactory police testimony. The named Ministries and supervising prosecutors must provide the strongest institutional support for the exercise of this obligation by prosecutors.

Recommendation 96: Police videotaping of suspects.

(a) The Durham Regional Police Service should amend its operational manual to provide that all interviews conducted with suspects within a police station be videotaped or audiotaped, absent truly exigent circumstances. Any practice of interviewing a suspect off-camera before a formal videotaped interview undermines this policy. Similarly, a practice of encouraging suspects to speak off the record or off-camera during an interview undermines this policy. Videotaping or audiotaping ultimately narrows trial issues, shortens trials, protects both the interviewer and interviewee from unfounded allegations and encourages compliance with the law; such a policy also enables the parties and the triers of fact to evaluate the extent to which the interviewing process enhanced or undermined the reliability of the statement.

(b) The Durham Regional Police Service should investigate the feasibility of adopting the practice of the Australian Federal Police of carrying tape recorders on duty for use when interviewing in other locations or indeed, for use when executing search warrants or in analogous situations.

(c) Where oral statements, which are not videotaped or audiotaped, are allegedly made by a suspect outside of the police station, the alleged statements should then be re-read to the suspect at the police station on videotape and his or her comments recorded. Alternatively, the alleged statement should be contemporaneously recorded in writing and the suspect ultimately permitted to read the statement as recorded and sign

it, if it is regarded as accurate.[85]

(d) Where the policy is not complied with, the police should reflect in writing why the policy was not complied with.

(e) The Ministry of the Solicitor General should work to implement this policy (in the very least) for all major Ontario police forces.

There was widespread support at the Inquiry for a policy of videotaping or audiotaping suspects (and witnesses generally). The York Regional Police Services Board suggested that "all interviews should be videotaped or audiotaped whenever possible. If recording is impracticable or timely, statements should be set out in a prescribed form signed by that person and the party taking the statement." The Durham Regional Police Service Board suggested that "whenever possible, interviews of important witnesses and suspects should be videotaped."

The judiciary has, at times, been vocal on the desirability of videotaping suspect interviews. In *R. v. Barrett*,[86] Carthy J.A. stated:

> Universal use of videotapes would obviously be of assistance to judges in weighing evidence and reaching a just conclusion, but beyond that, there is the potential to benefit the entire administration of justice.
>
> .....
>
> It is fair comment for a police officer who has secured a written confession to say, "he's as good as convicted". If the statement is admitted as voluntary the observation is probably accurate. On this determinative issue of conviction the police force has, by its own choice in his case, denied the court the opportunity of an undeniable record of what lead to the "conviction". Given the modest cost of videotape equipment, such critical evidence should not, in fairness, be restricted to

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[85] Of course, the recommended practice must also conform to the *Charter* s.10(b) and other legal requirements.

[86] (1993) 82 C.C.C. (3d) 266 (Ont. C.A.), rev'd on other grounds (1995) 96 C.C.C. (3d) 319

> sworn recollection of two contesting individuals as to what occurred in stressful conditions months or years ago. The evidence is admissible under our present rules, but everyone involved in the criminal justice system should make reasonable efforts to better serve its ultimate ends.

At issue in *Barrett* was the voluntariness of an inculpatory statement. The accused alleged that he only signed the statement because, *inter alia*, he had been assaulted by the police. Arbour J.A. (Tarnopolsky J.A. concurring) said this:

> Both the sally-port and the booking area at 52 Division are equipped with a video camera which recorded the entire booking procedure. We have had the advantage of reviewing the videotape which, if not of great quality, particularly as to sound, proves immensely superior to the recollection of the witnesses, even of those who took notes, as an evidentiary tool. As should be apparent from the conflict of the evidence summarized above, a videotape of the events which occurred at the crucial time when the appellant is said to have made the incriminating statements now tendered against him, would have been dispositive of most of the issues raised in the *voir dire*. Not only was the useful practice of recording the booking procedures not extended to recording the interviews with the appellant, but the note-taking practices of the hold-up squad officers left much to be desired.
>
> .....
>
> As for the absence of a video and/or audio recording of the interview, I am not the first one to express concern in that regard. In *R. v. Lim* (No. 3) (1990), 1 C.R.R. (2d) 148 (Ont. H.C.J.), a case also involving the Toronto hold-up squad, Doherty J. who was then the trial judge said, at pp. 152-3:
>
> > ... I am left with a distinct impression that the statement-taking process used by the holdup squad and the members of the York Regional Police Department was designed to both minimize the active involvement of the accused and preclude resort to any independent source of information (apart from

> the accused's testimony, should he elect to testify on the *voir dire*) as to what went on in the statement-taking process. The police appear to have set the stage for a battle of credibility on the *voir dire* and excluded any independent source of information which could have supported one side or the other.
>
> The failure of the police, who were in total control of the interview process — and who, on their evidence, were dealing with a co-operative accused — to have to resort to devices which could have provided a video or audio record of the procedure suggests the reasonable inference that the police did not want an independent electronic record of that process, because that record would not have supported their oral evidence as to Mr. Lim's ability to understand and speak English. I draw that inference.

In *R. v. Tat and Long*,[87] Doherty J.A. had to inquire into the considerations that potentially weighed against the reliability of a prior out-of-court identification (since denied by the witness). He said this:

> I find no adequate substitute for the presence of the fact finder at the time the statement was made. Not only is there no videotape of the January 5th interview, there is virtually no record of what occurred. Q. and the police officers had very different versions of what occurred at crucial points during that meeting. Not only did they disagree as to whether Q. had maintained his identification of Long throughout the interview, but Q. also testified, at one stage in his cross-examination, that his momentary identification of Long had been the product of a very suggestive conduct by Constable Dobro. The dynamics and nuances of the interplay between Q. and the police during their conversation could not be reproduced at trial. There was no way of approximating, much less replicating, the circumstances under which the purported identification was made. Where prior statements involve alleged identification by means of a line-up, the absence of anything like a videotape which can reproduce the

[87] (1997), 117 C.C.C. (3d) 481 (Ont. C.A.).

> circumstances in which the statement was made are particularly significant in assessing the reliability of the out-of-court statement.

Mr. Durno, Mr. Baig and Ms. Welch all supported the idea of videotaping interviews with suspects. Ms. Welch, however, felt that it should not be a mandatory requirement because it may not always be possible to do (for example, the equipment may malfunction). Inspector Mercier also believed that an element of flexibility was required. Contacts with suspects may be spontaneous or involve a struggle, and it may not be possible to record the conversation.

Sergeant Van Dyke advised that pursuant to a 1987 policy directive, Durham officers are currently instructed to take videotaped statements from accused persons whenever circumstances permit. A training video was created by Durham Police to provide proper instruction on technique.

With the passage of the *Criminal Evidence Act, 1984*, it became mandatory in England for all interviews with suspects to be tape recorded. Police officers are not supposed to interview suspects other than on videotape. Police cannot stop a suspect from volunteering information away from a camera, but are required to later put to the suspect, on camera and after the suspect has had a chance to consult with a lawyer, any significant statement or silence which occurred off camera, and ask the suspect whether he or she confirms or denies it.

Mr. Logan testified that the requirement for tape recording interviews has significantly reduced the prevalence of one of the most common causes of wrongful convictions:

> Q. Mr. Logan, what did Justice [Runciman] find in this document on miscarriages of justice to be the most common causes of wrongful convictions?
>
> A. Police misconduct, usually verballing or planting incriminating evidence. Wrongful identification, false confessions, perjury by a co-accused or other witness, and bad trial tactics were the five grounds that they found.
>
> Q. Okay, well, let's start at the first in terms of police misconduct. What do you mean by verballing?

Some of us may not be familiar with the term.

A. It's an expression which has much less currency than it used to have. Verballing was the assertion by a police officer that a conversation took place between him and an accused person, which was never contemporaneously recorded, but which the officer later wrote up. And it was a frequent source of contest between defendants and police, because there was actually no way of regulating it. Judges used to say that it was the refuge of a scoundrel to accuse the police officer of having invented a verbal, but in fact, the proof of the pudding is this, because when the brought in the Police and Criminal Evidence Act of 1984, and it became operative, it became necessary for all interviews to be tape recorded.

So consequently, suspects taken into a police station would be tape recorded. The British have a wonderful way of going about the question of testing something new. What you do is, you don't test it on the English; you test it either on the Irish, the Scots, or the Welsh. The Police and Criminal Evidence Act was tested on the Scots. Until the intervention of the Police and Criminal Evidence Act, confessions formed a large part of the method of achieving convictions in Scotland, as they did in England, Wales, and Ireland.

However, with the introduction of the Police and Criminal Evidence Act, and the necessity for those confessions to take place whilst being tape recorded, we suddenly had 46 per cent of all confessions occurring either in the cell corridor leading from the interview room to the cell, or in the police car before arriving at the police station.

And that taught us that police officers were going to be very slow to change their ways, and regarded this opportunity to fix the evidence at an early stage, as one of their most jealously guarded possessions. What has happened in the aftermath of the introduction of the Act and the education of the police force is that verballing has now almost completely disappeared, whereas it was a major factor before the introduction of the Act, it has almost disappeared.

Mr. Hadgkiss testified that Australian Federal Police officers are

required to videotape all formal interviews with suspects. The federal police headquarters in Melbourne has six to eight interview rooms equipped to specified standards. Mr. Hadgkiss was not aware of an instance when an interview room was not available, but in that event a police station with an available room would be found. At the very least, a tape recorder would be found.

Mr. Hadgkiss commented that it is rare that a technical malfunction would result in the unavailability of a video recording. By pressing one button the equipment simultaneously produces three videotapes: a working copy, a copy for the accused, and an original which is sealed and stored by the exhibits registrar. However, in the event of a technical problem, the interview would be repeated. Mr. Hadgkiss said that should an accused not repeat an earlier unrecorded admission, the courts would be most sceptical of the evidence and it would be "pretty unlikely that a court would admit verbal evidence of a police officer and his corroborator."

The video technology used by the Australian federal police will not permit the tape to be erased. In addition, a warning system alerts the investigator five minutes and one minute before the tape ends. When the tape is changed, or there is a break in the interview, an account of the interceding time is articulated once the tape restarts, and this is confirmed by the person interviewed. The time is continually displayed and recorded.

Videotapes are transferred to CD-Roms or DAT tapes for preservation. The original is stored in a property register at least until the conclusion of the trial and all avenues of appeal.

The Australian Federal Police have found that the practice of videotaping has increased the level of productivity. Not only is the system less cumbersome, but the admissibility of statements is no longer in issue and trials proceed without lengthy *voir dires*. Mr. Hadgkiss noted that videotaping works to protect the integrity of the officer.

Mr. Hadgkiss explained that because of the requirement that all formal interviews be videotaped, the Australian judiciary has come to expect the Federal Police, and increasingly the state police, to electronically record all conversations with accused persons, including conversations in police cars or the corridors of a police station. Defence counsel, too, challenge officers who do not electronically record events. Juries may be instructed to

consider the absence of a recording when assessing the credibility of the evidence.

In the event of an audiotape recorder malfunctioning, police officers are supposed to record any admission and the accused must sign the statement. The interview would be repeated upon arrival at the police station. In the event the admission was denied during the re-interview, the allegation that the accused had confessed would be looked upon by the courts with suspicion.

Inspector Mercier essentially supported the idea of police carrying hand-held tape recorders in order to address the issue of unrecorded verbal admissions. He believed it would probably help the police in more cases than it would not. He did foresee some logistical difficulties, however. There is a health and safety issue, with officers having to wear even more equipment on top of the twenty pounds they currently wear. The tapes may malfunction. Some officers take offence to the implied notion that their integrity is always open to question. Perhaps most importantly, resources would be required to purchase the tape recorders, control the tapes, and transcribe the recordings. Sergeant Van Dyke explained that the police do not have the necessary support staff; officers often have to transcribe recordings themselves.

Mr. Hadgkiss testified that the issue of cost has arisen in Australia as well. He acknowledged that the initial cost of equipping each police officer with a hand-held recorder is high, but believed that it is absolutely necessary to maintain the integrity of investigators. He noted that in a pilot project amongst highway patrol officers volunteering to use tape recorders, the number of complaints against them dropped dramatically.

It is clear to me that policies which mandate the videotaping of suspect interviews at police stations, subject to exigent circumstances, are long overdue. Further, the technology used by the Australian Federal Police should be evaluated for use here.

Recommendation 97: Exercise of trial judge's discretion.

A trial judge may wish to consider on an admissibility *voir dire* any failure to comply with any policy established pursuant to Recommendation 96 and may wish to instruct a jury (or himself or herself, as the case may be) as to the inference which may be drawn from

the failure of the police to comply with such a policy. In doing so, the trial judge (and, where applicable, the jury) should be entitled to consider the explanation, if any, for the failure to comply with the policy.

Recommendation 98: Police videotaping of designated witnesses.

The Durham Regional Police Service should implement a similar policy for interviews conducted of significant witnesses in serious cases where it is reasonably foreseeable that their testimony may be challenged at trial. This policy extends, but is not limited to, unsavoury, highly suggestible or impressionable witnesses whose anticipated evidence may be shaped, advertently or inadvertently, by the interview process. The Ministry of the Solicitor General should assist in implementing this policy (in the very least) for all major Ontario police forces.

As indicated above, the Durham Regional Police Service Board submitted that, whenever possible, interviews of important witnesses should be videotaped. Mr. Hadgkiss felt that all interviews with potentially contentious witnesses should be videotaped. Recent changes to the Crown policy on jailhouse informants have directed that the police be encouraged to take their statements on audiotape or videotape.

Mr. Culver believed that recording witness interviews would be beneficial, but noted that in the past there were some practical difficulties:

> I think both of us on both the defence Bar and the Crown all agree that videotaping and audio taping of witnesses is a good thing. It potentially can save time when it comes to trials to determine what exactly happened during the course of a police interview of either a witness or a suspect. The down side, both from the defence and the Crown perspective, has been that there's been a tendency with the police to basically just turn on the video or turn on the tape recorder and say: What happened?
>
> And I'm not faulting the police for that; I would say it's a human tendency. Before, if you had to take a statement and then make notes of it, you're going to sort of direct that witness along the lines of the information that you deem most relevant to what they're there for, whereas with the tape recorder, just turning it on and saying: What happened, we've

> noticed that certainly, witness statements have increased in length.
>
> And along with that, without the automatic production of transcripts which the police no longer do automatically, we often have situations where we get Crown briefs that are essentially a short synopsis, together with a package of video or audio tapes, and obviously, it's trite to say that most counsel, defence and Crowns, can review a written brief a lot quicker than you can sort of listening to and watching audio tapes that may go on for minutes, sometimes hours in length.
>
> So it has been a problem, and as yet, the resourcing of who's going to produce these transcripts, and when they are produced, and in what situations, hasn't totally been resolved in this province. So that we're still running into situations, as I indicated, where the Crown brief will be delivered, and it's a package of, in some cases, audio tapes. And obviously, that adds to the preparation time for Crowns, and it equally adds to the preparation time for defence counsel if they're faced with the same situation as part of the package of Crown disclosure.

Mr. Durno shared Mr. Culver's concern about the lack of transcripts. I consider this aspect of the issue in a later recommendation.

The Marshall Inquiry approved of the idea of videotaping police interviews with witnesses (and suspects):

> 75. We recommend that audio-visual recording of police interviews of chief suspects and witnesses in serious crimes such as murder, and of juveniles and other interviewees who may be easily influenced, be encouraged.

Mr. Briggs testified that audio-visual recording of interviews in Nova Scotia is increasingly being done by police, but it is not yet a universal practice. "I think it's done on a selective basis depending on the nature of the case and the nature of the evidence they're hoping to obtain and perhaps sensitivity around all of that."

It may be impracticable for every interview conducted with every witness to be videotaped or audiotaped. This recommendation, therefore, narrows the implementation of such a policy to significant witnesses in serious cases, where it is reasonably foreseeable that their testimony may be an issue at trial. Of course, nothing should prevent the videotaping of even uncontentious evidence, in the discretion of the investigating officers. Such a policy should also set parameters for 'significant' witnesses and for 'serious' cases.

Recommendation 99: Crown videotaping of interviews.

Crown counsel should not be mandated to videotape or audiotape their interviews with witnesses. However, the Ministry of the Attorney General should study, in consultation with the Ontario Crown Attorneys' Association or representative Crown counsel, the feasibility of limited videotaping or audiotaping of selected interviews, where the tenor of the anticipated interview or the nature of the person being interviewed would make such a contemporaneous record desirable to protect Crown counsel or would be in the interests of the administration of justice.

I have not adopted the suggestion made by several parties at the Inquiry that all interviews by Crown counsel should be videotaped or audiotaped. In my view, this is impracticable, unduly inhibits the conduct of criminal prosecutions, is unnecessary and cost inefficient. I have instead recommended that the feasibility of discretionary videotaping or audiotaping be examined.

The Criminal Lawyers' Association made a similar suggestion, namely, that a committee be struck to address when Crown counsel should record witness interviews and what facilities are required.

Mr. Culver testified that Crown interviews are not recorded at the present time, aside from having a police officer present to take notes. The Crown has considered video or audio recording witness interviews, but there are no plans to do so, partly because of budgetary factors. Mr. Culver believed that the volume of cases that are dealt with by the average Crown attorney does not make such taping of interviews very practical; at present witnesses are often not formally interviewed by Crown counsel prior to trial. In the more complicated cases, where witness preparation or interviews do

take place, Mr. Culver stated that "we certainly await what this Inquiry will have to say, but there are certain practical issues that will have to be looked at first."

Mr. Wintory rejected the idea of taping Crown interviews with witnesses. He thought it would pose a logistical nightmare because most Crown interviews with witnesses are rushed, over the phone, or in the hallways.

Mr. Kyle testified that Crown interviews with witnesses are not currently tape recorded in England, and he was not aware of any move to do so. Nor was he in favour of the idea: "You establish a better rapport with witnesses without a tape recorder. But, of course you have to make sure that you have an appropriate method of recording the interview that you have."

Recommendation 100: Creation of policies for police note taking and note keeping.

Police note taking and note keeping practices are often outdated for modern day policing. Officers may record notes in various notebooks, on loose leaf paper, on occurrence reports or supplementary occurrence reports or on a variety of other forms. The Ministry of the Solicitor General should take immediate steps to implement a province wide policy for police note taking and note keeping. Financial and other resources must be provided to ensure that officers are trained to comply with such policies. Minimum components of such a policy are articulated below:

a) There should be a comprehensive and consistent retention policy for notes and reports. One feature of such a policy should be that, where original notes are transcribed into a notebook or other document, the original notes must be retained to enable their examination by the parties at trial and their availability for ongoing proceedings.

b) A policy should establish practices to enable counsel and the police themselves to easily determine what notes and reports do exist. These practices might involve, for example, direction that one primary notebook must bear a reference to any notes or reports recorded elsewhere — for instance, October 4, 1998: supplementary report

prepared respecting interview conducted with A. Smith on that date.

c) The pages of all notebooks, whether standard issue or not, should be numbered.

d) Policies should be clarified, and enforced, respecting the location of notebooks.

e) The use of the standard issue "3" by "5" notebook should be revisited by all police forces. It may be ill suited to present day policing.

f) The computerization of police notes must be the ultimate goal towards which police forces should strive.

g) Policies should be established to better regulate the contents of police notebooks and reports. In the least, such policies should reinforce the need for a complete and accurate record of interviews conducted by police, their observations, and their activities.

h) Supervision of police note taking is often poor; enforcement of police regulations as to note taking is equally poor. Ontario police services must change their policies to ensure real supervision of note taking practices, including spot auditing of notebooks.

In its written submissions, the York Regional Police Services Board urged the Ministry of the Solicitor General, in cooperation with police services, to establish province-wide guidelines and training on what should be included in a police officer's notebook. Mr. Lawrence testified that there are currently no provincially prescribed standards with respect to note-taking. There is a guideline, but it is not mandatory.

It is clear that the ways in which notes are taken and retained by police officers are diverse and problematic. Professor Ericson conducted a study in 1981 which showed notes were routinely treated haphazardly, sometimes not written up until days after an event. The note taking practices in the *Morin* investigation were, at times, appalling. Though practices may have improved since then (and since Ericson's study), the absence of mandated and enforced standards for note taking invites similar practices.

The evidence showed that the traditional police notebook is starting

to fall out of use. Sergeant Van Dyke was a member of a committee which looked at police services across the country. The committee discovered that few services in major crime investigations used the traditional notebook. Rather, they used laptop computers, steno pads and binders containing completed supplementary reports.

The Durham Criminal Investigations Unit discontinued use of the traditional notebook in 1997. It was replaced with a three ring binder in which officers keep copies of their reports, handwritten notes and other documentation. Reports are written contemporaneously and tendered at the end of the day to the records branch where they are reviewed and the dates confirmed. Corrections or additions can be made by filing a supplementary report. Once placed in the digital system, the information can be retrieved almost immediately and downloaded to a computer disk. Digital copies of supplementary reports are retained for at least 10 years. According to Van Dyke, the risk of loss is virtually nonexistent. His experience is that the system works very well. He could not comment on what steps could be taken to ensure that the computer-generated reports were not edited.

Sergeant Van Dyke testified that Durham's objective is to issue all patrol cars with a laptop computer by the year 2000:

> The days of handwriting out notes are slowly passing us by. We have to prepare for the future. Every other organization in the world uses computer technology to do their notes, and certainly policing is no different. I believe we have to use that, as well, and that it's only a matter of time before the old traditional methods are going to be behind us.

Mr. Hadgkiss described the experience and system of the Australian Federal Police:

> Q. All right. Now I want to ask you a little bit more about a couple of things. First of all, police notebooks, are they still kept in Australia, or are they being phased out? The individual police officers?
>
> A. Police notebooks are still issued to police officers, and I only talk for the federal police. But again, we have been criticised of late by the Bench about our method of keeping notes, particularly the

contemporaneous nature. What police have had a tendency to do, and more so with their surveillance people, is when working as a team, they have made individual notes. At the conclusion of their shifts, there has been what they call a scrum-down or whatever. They get together ---

Q. A scrum-down, okay.

A. It's a quaint rugby term.

Q. It's also a media term, a media scrum, around here.

A. Well, the police would return to their office, they would hand over to the next surveillance shift, or group of investigators, out they would go. They would then sit around a computerised terminal. They would then all input into what has taken place during the day, that the suspect left home at a certain time, they followed him to here, they followed him to there, and each would participate.

There would be then a running sheet compiled, the times he'd turn into Smith Street, went in the bank, and which officers saw him down the margin. But unfortunately, there has been a practice come in where police then will sign off on that, even though it's made the same day and as soon as practicable, but unfortunately, their original notes, be they on the back of candy paper or bits of paper that they've used during the day, or tape recordings, have then been destroyed, because they say that is then the composite recollection.

And we've been criticized because the original notes, the contemporaneous notes or tape recordings made at the time were destroyed. And what we've tried to change now is: No, you must keep the original notes because they're of a contemporaneous nature. And you can still produce the composite document which shows the day's activities, but you must explain how that document came into existence. And it derived from a collection of notes of maybe eight officers.

But there is a requirement that they keep them, and we have moved to, instead of the old-fashioned English

> system of small police notebooks which get dog-eared, and the ink runs, or have been noted to be destroyed and rewritten, and there's allegations of such, we are moving to where investigators will have a decent book, it is hard-covered, and that they will keep their activities on there.
>
> And we insist that senior officers check those books regularly as to their neatness, as to the factual content, and they sign a record to that effect. It's part of my duty. I have a staff officer who submits his diary quite regularly, every two weeks, and I go through, even though he had basically an administrative function. But I record that I have checked, so then that protects him if, in due course, he has to appear before a court, that's he's keeping contemporaneous notes, or he's keeping a diary.

Recommendation 101: Police protocols for interviewing to enhance reliability.

The Ministry of the Solicitor General should establish province-wide written protocols for the interviewing of suspects and witnesses by police officers. These protocols should be designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview.

Recommendation 102: Training respecting interviewing protocols.

All Ontario investigators should be fully trained as to the techniques which enhance the reliability of witness statements and as to the techniques which detract from their reliability. This training should draw upon the lessons learned at this Inquiry. Financial and other resources must be provided to ensure that such training takes place.

I have found that interviewing techniques in the *Morin* investigation could have a direct impact on the content of witnesses' testimony. Professor Martin spoke to this issue in systemic terms:

> Influence on witnesses occurs either directly in the sense of attempting to make witnesses change their testimony, or very frequently, indirectly, in the sense that the very certain and very persuasive police officer

> keeps questioning a witness until the witness provides the answer that the officer's been seeking. And there's a considerable amount of very good literature on how common that is in witnesses in police investigations. It's a very human trait; you want to please the person who's helping you, and I would venture a guess that in some instances, at least, maybe many, the police officers are not fully aware of what they're doing.

Mr. Lawrence testified that there was not much training regarding interviewing protocols in the early 1980s. In the late 1980s, however, investigative interviewing was identified by the Ontario Police College as one of six key investigative skills. As a consequence, in early 1990s, the amount of training in the area was expanded from a half-day to almost four days.

Sergeant Van Dyke explained that since 1994, the Durham police have been teaching the 'cognitive interview technique' to officers in all areas of investigative training. All uniformed supervisors in the Service were trained in the technique in 1995. The technique is used primarily for interviewing witnesses, rather than accused persons.

Sergeant Van Dyke prepared a brief explanation of this technique for the Commission:

> In the early 1985 a revolutionary interview technique was developed by Edward Geiselman and Ronald Fisher of the University of California which is referred to as the Cognitive Interview Technique. Their process represented a collection of memory-jogging techniques designed to provide investigators with an organized series of step by step procedures that help victims and witnesses retrieve and elaborate on information stored in memory. It is designed to enhance recall, is easy to learn and maximizes the quantity and quality of information while minimizing the effects of misleading or inaccurate information. Studies show that this technique can produce as much as 45% more accurate information. The process includes reconstructing the circumstances, reporting everything, recalling events in a different order and changing perspectives.

Van Dyke elaborated on this in his testimony before me:

> Basically, it takes people back to the scene, it sort of puts them in other people's footsteps so that they can view the scene from a more objective perspective. And basically, it gets away from the standard way we've done interviews in the past, which is interrupting people on a consistent basis, and perhaps giving them information that they shouldn't have ahead of time.

One aspect of the technique is the 'pure version statement,' whereby the witness answers open-ended questions without interruption. A verbatim statement (including 'ums' and 'ahs') is recorded. Clarification questions can be asked at the end. The purpose is to obtain the best information which can later be analyzed using statement analysis techniques.

Sergeant Van Dyke added that the cognitive interview technique has been adopted by the Ontario Police College and the Canadian Police College. Both offer interviewing courses and statement analysis courses. He indicated that the forensic interviewing course offered at the Canadian Police College is considered one of the best in the country. A number of Durham officers have been trained in that course.

It is obvious to me that Durham has moved in the right direction. The York Regional Police Association suggests that their police officers are not receiving this kind of training. They should be, as should all police services.

Recommendation 103: Prevention of contamination of witnesses through information conveyed.

Police officers should be specifically instructed on the dangers of unnecessarily communicating information (known to them) to a witness, where such information may colour that witness' account of events.

Inspector Mercier was alive to the possibility that witnesses may be contaminated by the police (or others). He explained that this is why Durham's technique of asking open ended questions without interruption is important. It is also why it is important to ensure that witnesses are isolated and do not discuss their evidence with anyone prior to being interviewed. Mercier was specifically asked about confronting witnesses with inconsistent evidence:

> MR. SIMS: Is it improper to confront a witness and to

> point out that their statements and their evidence is inconsistent with another person's, a witness, and ask them to attempt to reconcile the differences?
>
> INSPECTOR MERCIER: With witnesses themselves, it's their version, and that's what's important. If they're inconsistent there may be questions to clarify, so we have an understanding of what -- how could they have misunderstood something? And they're clarification-type questions. They're never confronted with regards to: You're absolutely wrong, or: This can't be, in that method. We allow them to give their statement, it's recorded, and it's documented and disclosed.

Sergeant Van Dyke testified that the Durham Regional Police Service has developed a local practice when dealing with victims or families of victims in major crimes not to disclose information received in the course of the investigation. These persons are advised at the outset that this information will be kept within the police investigative team 'in order to protect the investigation in the court process,' but that they will be updated as to arrests and what happens in court. I support this practice.

Recommendation 104: Prevention of contamination of witnesses through commentary on case or accused.

Police officers should be specifically instructed on the dangers of communicating their assessment of the strength of the case against a suspect or accused, their opinion of the accused's character, or analogous comments to a witness, which may colour that witness' account of events.

Mr. McCloskey referred to the case of Dumosa Vega as an example of the dangers which exist when police advise witnesses of the strength of the evidence (real or imagined) against an accused:

> Now we have a case where Dumosa Vega did nine years for a murder in Momant County in New Jersey and one of the main witnesses against him was the victim's sister who came in and told the jury that Mr. Vega was having an affair with the victim, her sister, and that her sister, the victim, told her that two days before her death that she was going to break off the affair with Mr. Vega, but she was afraid of him and

> what his reaction might be.
>
> Well, that was very damning testimony, and it went unrebutted. But what the police did to obtain that testimony, is they went to the victim's family and said, look, we got this best friend confession -- Vega, the defendant's best friend's confession to him that Vega did this.
>
> Q. Right.
>
> A. We got an eyewitness, but we need motivation. And then they lie to the family ... they lie to the family. They said the semen found in your daughter's vaginal wall was Mr. Vega's. Well, that was false because the vaginal swab was lost immediately. They also lied to the victim's family to try and get them to cooperate, [to] become part of the project to convict, by saying that the belt found around the daughter's neck was Dumosa Vega's belt. It wasn't — it was her common-law husband's belt.
>
> And so now the ends justify the means. The sister comes in and gives this false testimony. And by the way, at the evidentiary hearing, we brought — the victim's sister came in and admitted that she lied.

Mr. McCloskey suggested that a victim's family is particularly vulnerable to being contaminated by the police: "[T]hey're convinced that the police have the right person and now it just becomes a matter of trying to help the police out." The connection to the Morin proceedings is obvious.

Recommendation 105: Interviewing youthful witnesses.

Police officers should be specifically instructed how to interview youthful witnesses. Such instructions should include, in the least, that such witnesses should be interviewed, where possible, in the presence of an adult disinterested in the evidence.

Several youthful witnesses gave evidence against Donald Marshall. The Marshall Inquiry found that statements from these witnesses were obtained by the police through tactics that were "reprehensible." Intimidation tactics were employed, parents were excluded from interviews, witnesses were held until late into the night, etc. The Inquiry expressed great concern

over these events, and made a recommendation similar to the one set out above:

> 74. We recommend that in cases where suspects and/or witnesses are juveniles or mentally unstable investigating officers make special efforts to ensure they are treated fairly. Supportive persons from the witness/suspect viewpoint should be present during interviews.

Mr. Culver testified that the Toronto Crown Attorney's office has a specialized unit to deal with child abuse cases because it has found that dealing with child witnesses requires specialized training and expertise.

Recommendation 106: Crown education respecting interviewing practices.

The Ministry of the Attorney General should establish educational programing to better train Crown counsel about interviewing techniques on their part which enhance, rather than detract, from reliability. The Ministry may also reflect some of the desirable and undesirable practices in its Crown policy manual.

Ms. Narozniak stated that education on proper interviewing techniques has been "referred to" in Crown training programs; Crown attorneys have been made aware of studies on what sort of techniques enhance or detract from reliability. Mr. Griffiths testified that interviewing techniques for vulnerable individuals is part of Crown education on sexual assault, child abuse and domestic assault cases. Mr. Culver said that his office sends Assistant Crown Attorneys to a training session, organized by several social agencies, on how to interview young children.

Recommendation 107: Conduct of Crown interviews.

Earlier in this Chapter, I have noted the dilemma facing Crown attorneys when preparing witnesses for trial. On the one hand, counsel should not be suggestive, and should not try to dovetail the evidence of a number of witnesses to make a perfect whole. On the other hand, counsel may understandably wish, in fairness to a witness and with a view to ascertaining the true facts, to advise the witness of conflicting evidence in order to invite comment and reflection.

I have previously suggested guidelines respecting the conduct of interviews. I reiterate them here.

a) Counsel should generally not discuss evidence with witnesses collectively.

b) A witness' memory should be exhausted, through questioning and through, for example, the use of the witness' own statements or notes, before any reference is made (if at all) to conflicting evidence.

c) The witness' recollection should be recorded by counsel in writing. It is sometimes advisable that the interview be conducted in the presence of an officer or other person, depending on the circumstances.

d) Questioning of the witness should be non-suggestive.

e) Counsel *may* then choose to alert the witness to conflicting evidence and invite comment.

f) In doing so, counsel should be mindful of the dangers associated with this practice.

g) It is wise to advise the witness that it is his or her own evidence that is desired, that the witness is not simply to adopt the conflicting evidence in preference to the witness' own honest and independent recollection and that he or she is, of course, free to reject the other evidence. This is no less true if several other witnesses have given conflicting evidence.

h) Under no circumstances should counsel tell the witness that he or she is wrong.

i) Where the witness changes his or her anticipated evidence, the new evidence should be recorded in writing.

j) Where a witness is patently impressionable or highly suggestible, counsel may be well advised not to put conflicting evidence to the witness, in the exercise of discretion.

k) Facts which are obviously uncontested or uncontestable may be approached in another way. This accords with common sense.

Recommendation 108: Treatment of 'late-breaking evidence.'

Police officers should be instructed how to address and evaluate 'late breaking evidence,' that is, evidence which could reasonably be expected to have been brought forward earlier, if true. These instructions would include an exploration of the information available to the witness, the reason or motivation for the untimely disclosure, etc. These instructions would also include the need to attempt to independently confirm such evidence and, in appropriate circumstances, to view such evidence with caution.

Mr. Culver had this to say on the issue of 'late-breaking evidence':

> [A]nyone that's done a major high-profile case, you always almost deal with that. And I think you have to look at what the evidence is and assess why it's late-breaking. There may be a perfectly valid explanation. For example, someone didn't realize the significance of the evidence until the trial started, and until the reporting was in the media.
>
> But generally speaking, it depends on what the evidence is, and I think the particular test there should be to look at, why is it late breaking? Why didn't it come to light, why didn't the police obtain that evidence earlier, or why didn't the person come forward with that evidence? Was it simply something about the trial process itself that triggered it? It's not necessarily unreliable or necessarily reliable.

The York Region Police Services Board accepted the notions that 'late-breaking' evidence should be considered with caution and that all efforts should be made to independently verify its accuracy.

Recommendation 109: Review of completed investigations.

There should be an institutionalized requirement for review of all major crime investigations once completed.

This recommendation was raised by the Durham Regional Police Service Board. The Board suggested that the review should focus on how the case management system might be improved in future investigations. It

should not focus on the substantive elements of the investigation, but rather on the process.

The Runciman Commission made this recommendation:

> 25. Reviews of certain selected major investigations should be conducted by Her Majesty's Inspectorate of Constabulary assisted by officers from another force.

It also recommended:

> 27. Following major investigations, there should be a full debriefing involving all the parties so that future investigations can benefit from the experience gained.

Mr. Logan testified that the former recommendation emanated from concerns over the investigation into the Yorkshire Ripper murders. Evidence which could have prevented the deaths of three or four young women was in the hands of the police, but was not "capable of being surfaced to enable them to focus on the correct suspect." Similar concerns have arisen at this Inquiry.

Mr. Briggs testified that a type of investigation review was, unsuccessfully, conducted in the Donald Marshall case. After Mr. Marshall was convicted, an individual named Jimmy MacNeil came forward and said that Roy Ebsary had committed the murder. A police inspector did a 'paper review' as a result of this, and ultimately concluded that MacNeil was fantasizing. MacNeil's statement was not disclosed to the defence on appeal. The Marshall Inquiry considered the investigation conducted by the inspector to be grossly negligent. Mr. Briggs testified that the lesson from this is that one must always be asking questions, re-evaluating and double checking. *One must challenge the presumption that the first investigation did it right.*

Mr. Hadgkiss also testified that a key aspect of the case management system in Australia is a quality assurance review process. This review process is premised on the concern that after a period of time, dedicated investigators may 'lose sight of the forest for the trees' and their objectivity may be impaired by a sense of determination. In major cases where large amounts of resources are being expended, independent experienced officers are brought in to assist by conducting an audit. These officers report their findings to a

management team which must address shortcomings in the investigation. A copy of the report is provided to the investigators who are asked to reply.

I cannot say whether the approach described by Mr. Hadgkiss commends itself to the case management system in Ontario or to major investigations in Ontario generally. It is an idea worthy of consideration.

Recommendation 110: Limitations upon criminal profiling.

Police officers should be trained as to the appropriate use of, and limitations upon, criminal profiling. Undue reliance upon profiling can misdirect an investigation. Profiling once a suspect is identified can be misleading and dangerous, as the investigators' summary of relevant facts may be coloured by their suspicions. A profile may generate ideas for further investigation and, to that extent, it can be an investigative tool. But it is no substitute for a full and complete investigation, untainted by preconceptions or stereotypical thinking.

Inspector Mercier testified that both the Ontario Provincial Police and the Royal Canadian Mounted Police have criminal profilers. They are trained by the FBI.

Mr. Hadgkiss was not in favour of criminal profiling. It can wrongly focus investigators: "As soon as you start stereotyping your suspect or whatever, I feel your whole investigation is very much constrained." In his opinion, the reliability of this kind of methodology is as good as clairvoyance. Inspector Mercier felt differently. He believed that each case has to be examined individually. He stated:

> [Y]ou always have the possibility that your perpetrator's not a part of that 93 per cent percentile [included within the profile], and you always have to ensure that you don't have tunnel vision on a profile, though you may use it to some degree to help you maybe eliminate a suspect, or maybe identify a suspect, or aid your investigators down certain avenues that you may wish to proceed down.

The Durham Regional Police Service suggested that the risks inherent in profiling be included in both the basic and advanced investigators' courses. I support this proposal.

Recommendation 111: The public dissemination of a purported profile.

In a notorious case, the public dissemination of a purported profile, which has been reshaped to fit an identified suspect or accused (and which makes that person readily identifiable in the community), with the view of inducing that suspect to incriminate himself or herself by words or conduct, is an improper use of criminal profiling. Though police are permitted, in law, to use some forms of trickery, this technique stigmatizes the suspect in the community and may render a fair trial in that community an impossibility.

In its written submissions, the Durham Region Police Service Board accepted that "profiles should not be referred to or publicly disseminated through the media in a way that could sway the public or poison the public's attitude against an accused."

Recommendation 112: The recording of facts provided to a profiler.

Where profiling is used as an investigative tool, the summary of relevant facts should be provided to the profiler in writing, or discussions of these facts by the investigators with the profiler accurately recorded. This ensures that the foundation for the profile can later be evaluated by these or other investigators or other parties.

Recommendation 113: Polygraph tests.

a) Police officers should be trained as to the appropriate use of, and limitations upon, polygraph results. Undue reliance on polygraph results can misdirect an investigation. The polygraph is merely another investigative tool. Accordingly, it is no substitute for a full and complete investigation. Officers should be cautious about making decisions about the direction of a case exclusively based upon polygraph results.

I have found that undue reliance was placed upon the polygraph in the *Morin* investigation.

Inaccurate polygraph results have also had an effect on at least one other wrongful conviction. After Donald Marshall was convicted of the murder of Sandy Seale, a man named Jimmy MacNeil came forward with evidence that Roy Ebsary had actually committed the crime. Mr. Ebsary

denied his guilt. Both were given polygraph tests. The results were inconclusive for Mr. MacNeil, but indicated that Mr. Ebsary was telling the truth. After Mr. Marshall's exoneration, Mr. Ebsary was convicted of the murder.

Mr. Hadgkiss felt that the disadvantages of polygraph testing far outweigh the advantages as a result of the ability of the subject to manipulate the test. Based on the (admittedly limited) evidence before me, I certainly appreciate his concerns. Other witnesses, however, felt that polygraphs can be useful as investigatory aids. Inspector Mercier testified that the polygraph is an investigative tool which can be used to direct an investigative team. Sergeant Van Dyke testified that, although there are lots of detrimental things about polygraphs, they have withstood the test of time, and are one of the few tools available to assist in the determination of truth. He agreed, however, with the following conclusion of the Royal Commission into Metropolitan Toronto Police Practices:

> The polygraph test — which in my view is neither scientifically valid, nor accurate, and which is not a physiological test but rather a dubious psychological test, should not be used in the criminal law process for other than investigative purposes.

The Durham Police Operations Directive on polygraphs stipulates:

> The polygraph (lie detector) is an investigative aid not to be used as a bargaining tool. Its main purpose is to determine the accuracy of responses to given questions. The results may assist the investigator and lead to the discovery of admissible evidence.
>
> An examination may be conducted at any time during the course of the investigation; however, it is generally not used until the latter stages when traditional investigative methods have been exhausted and evidence obtained casts doubt on the credibility of the involved party ...
>
> In situations where polygraph tests are to be used to eliminate suspects, the investigator will initially attempt to eliminate as many individuals as possible.

The Durham Regional Police Services Board suggested that the risks

inherent in polygraphs be included in both the basic and advanced investigators' courses. I agree. Undue reliance on polygraphs can misdirect the course of an investigation, either away from the guilty party or towards an innocent one. If they are going to be used in criminal investigations, the police must be trained as to their limitations. Officers must be taught to use polygraphs as nothing more than an investigative *aid*.

b) The documentation respecting polygraph interviews, including any information provided to the examiner by the investigators or by the person examined, should be preserved until after the completion of any relevant court proceedings or ongoing investigations.

Most of the documentation relating to the polygraph examinations of Messrs. May and X was destroyed by Sergeant Van Dyke one year after the examinations were conducted. Van Dyke testified that the documents were destroyed pursuant to a police by-law which mandated destruction after one year if no charges were laid in relation to the polygraph and the documents were of no evidentiary value. This policy was a product of the problems encountered in storing the bulky documentation produced during a polygraph examination. Sergeant Van Dyke explained that this problem no longer exists, since all polygraphs are now done on computer, and all documents are now retained by the police (unless they have no apparent relevance to anything).

Sergeant Van Dyke had no difficulty with the suggestion that polygraph documentation should be kept until all relevant court proceedings are completed:

> Q. [I]f the Commissioner, down the road, were to recommend for police forces conducting polygraph examinations that all of the documentation generated be preserved in the very least until the court case is completed, and any appellate proceedings exhausted, do you see any impediment to proceeding that way, any problems with that?
>
> A. Not today. Twelve years ago, perhaps, but not today.

Recommendation 114: Creation of a committee on outstanding disclosure issues.

The Martin Committee significantly changed the practices for pre-screening and disclosure in criminal cases in Ontario and elsewhere in Canada. The Committee's report, together with the decision of the Supreme Court of Canada in *R. v. Stinchcombe*, continue to provide a blueprint for disclosure in criminal cases in Ontario. Notwithstanding this important guidance, there continue to be many cases in Ontario where disclosure issues delay the commencement of trials, result in adjournments, in stays of proceedings, and in mistrials. Some of this is the inevitable application of rules to individual cases. But other instances would appear to result from some uneven practices, serious logistics difficulties between Crown and police and the form of the disclosure itself — untranscribed tape recordings, unreadable notes, etc. Some arise from continuing, difficult issues as to the line of demarcation between disclosure, which is required, and prosecutorial investigation for the defence, which is not. As well, other recommendations in this Report have disclosure implications which are unclear. Mandatory audiotaping or videotaping of interviews raise important and difficult issues as to the form of disclosure. Resource issues are also raised. Access to personal files of jailhouse informants raise other important issues. The right to an 'open box' was the subject of conflicting evidence at this Inquiry.

It is time for a Committee of stakeholders in the administration of criminal justice, Crown counsel, defence counsel, the judiciary, and the police, similarly constituted as the Martin Committee, to revisit outstanding issues of disclosure, with a view to greater efficiency and uniformity of practice, and with a view to resolving outstanding disclosure issues identified at this Inquiry.

AIDWYC made a number of recommendations with respect to the issue of disclosure:

> **Recommendation 11**
> That the Attorney General of Ontario, alone or in concert with the Solicitor General of Ontario and the federal government, establish policies, institutions and procedures:
>
> (a) to establish a policy of "open box" disclosure'
> (b) to educate the Crown and the police regarding the importance of providing full disclosure to the

accused;
(c) to render enforceable the right of an accused person to full disclosure; and
(d) to make those who fail to discharge the duty to disclose accountable for their actions.

Recommendation 12
That, in accordance with the recommendation of the Marshall Commission, the Attorney General of Ontario urge the federal government to implement amendments to the Criminal Code of Canada as follows:

"1. A justice shall not proceed with a criminal prosecution unless the justice is satisfied:

(a) that the accused has been given a copy of the information or indictment reciting the charge or charges against the accused in that prosecution; and
(b) that the accused has been advised of the accused's right to disclosure and understands that right.

2. The accused is entitled, before being called upon to elect the mode of trial or to plead to the charge or charges against the accused, to receive full and timely disclosure of all information in the possession of the Crown which is potentially relevant to the accused's guilt or innocence.

3. The accused person's entitlement to disclosure of all information in the possession of the Crown which is potentially relevant to the accused's guilt or innocence is a continuing one, and the prosecutor has a continuing obligation to provide disclosure to the accused person as it comes into the possession of the prosecutor, until such time as the accused person is acquitted, or a stay of proceedings is entered on the charges faced by the accused."

Recommendation 13
That, in accordance with the recommendation of the Marshall Commission, the Attorney General of Ontario establish a policy stating that no relevant information may be withheld from the accused without the prior written approval of a Deputy Attorney General, a copy

of which written approval shall be disclosed to the accused.

.....

Recommendation 15
That the Attorney General of Ontario urge the federal government to implement amendments to s. 139 of the Criminal Code of Canada (Obstructing Justice) as follows:

> "139. (4) Every one who, having the duty to disclose information to an accused person, wilfully withholds information which he or she knows to be potentially relevant to the accused person's ability to make full answer and defence is guilty of
>
> > (a) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
> > (b) an offence punishable on summary conviction."

Recommendation 16
That an amendment be implemented to the Crown Attorney's Act as follows:

> "1. Every Crown Attorney who, having the duty to disclose information to an accused person, wilfully withholds information which he or she knows to be potentially relevant to the accused person's ability to make full answer and defence is guilty of an offence punishable on summary conviction."

Recommendation 17
That, in accordance with the recommendation of the Martin Committee, s. 1(c)(viii) of the Code of Offences, a Schedule to Regulation 791 under the Police Services Act, R.S.O. 1990, c. P-15, be amended to read as follows:

> "1. Any chief of police, other police officer or constable commits an offence against discipline if he is guilty of
>
> (c) NEGLECT OF DUTY, that is to say, if he,
>
> > ...where a charge is laid fails to disclose to the officer in charge of the prosecution or the

prosecutor any information that he or any person within his knowledge can give for or against any prisoner or defendant."

Recommendation 18

That the Rules of Professional Conduct of the Law Society of Upper Canada be amended so as to make a disciplinary offence the wilful or negligent failure on the part of a lawyer to disclose relevant information to an accused person, where that lawyer has a duty to disclose such information.

Recommendation 19

That, in accordance with the recommendation of the Martin Committee, the Solicitor General of Ontario co-ordinate with federal authorities, and that both issue such directives as are necessary to require all police forces operating within the province of Ontario to be aware of and comply with the Attorney General's directives on disclosure in their relations with Crown prosecutors. These directives should make clear that:

(a) the police and other investigators are bound to exercise reasonable skill and diligence in discovering all potentially relevant information, even though such information may be favourable to the accused;

(b) the police and other investigators are under a duty to report to the officer in charge or to Crown counsel all potentially relevant information of which they are aware, including information favourable to an accused, in order that Crown counsel may discharge the duty to make full disclosure;

(c) the provision of full and timely disclosure to the accused operates to the benefit of all parties involved in the administration of criminal justice, including the police, by among other things decreasing the number of requests for disclosure, increasing the number of early resolutions of criminal cases, and decreasing the necessity of involving police in later stages of the process (e.g. as witnesses);

(d) a failure to disclose all potentially relevant information as required is a disciplinary offence.

Recommendation 20
That the Attorney General of Ontario issue such directives as are necessary to require all Crown Attorneys operating within the province of Ontario to be aware of and comply with the Attorney General's directives on disclosure. These directives should make clear that a failure to disclose all potentially relevant information as required is a disciplinary offence.

Recommendation 21
That the Attorney General of Ontario establish a policy stating that where a Crown Attorney is aware of the existence, in the possession of third parties, of evidence potentially relevant to the accused person's ability to make full answer and defence, that Crown Attorney must disclose the existence and location of the information to the accused person.

I prefer that some of these issues be explored by a Committee similarly constituted as the Martin Committee.

It is clear that the decision in *Stinchcombe* and the expanded obligation on the Crown to provide full disclosure has had a tremendous impact on the criminal justice system. Mr. Culver spoke of the fact that courts often have to deal with pre-trial motions relating to alleged non-disclosure, and that a great deal of time is taken up litigating the issue. Messrs. Mitchell and Culver both noted that the expense of providing full disclosure has had a tremendous impact on the Crown's budget.

Disclosure is obviously a critical issue in the our system of justice. It is also related to the issue of miscarriages of justice. Several witnesses pointed to the fact that disclosure problems are frequently an aspect of wrongful convictions.

Mr. McCloskey believed that an 'open file' disclosure policy would help prevent such convictions. The Morins and the Criminal Lawyers' Association suggested that the Attorney General implement such a policy. Mr. Gover felt that the courts should have the discretion to order 'open box' disclosure where there is reason to believe the police or the Crown have acted with *mala fides* with respect to their disclosure obligations, but he was concerned about protecting items which are properly privileged. Mr. Mitchell

testified that his office generally applies an 'open box' disclosure policy, but that difficulties arise in large prosecutions which produce huge amounts of material, much of which is not relevant to either side:

> The difficulty is who makes that call. In our disclosure system, it should be up to the defence, and really the only way to do that is to sort of engage in a process of open-box disclosure.
>
> .....
>
> The problem that we run into with respect to disclosure is not what's in the box, but what's not in the box, and what defence counsel want the police to put in the box, and to conduct the further inquiries and to take it the one step further, and the remedies that are being sought for any intransigence by either the Crown or the police for not going that extra step, or that extra mile.

I note that there presently exists a Criminal Justice Review Committee, which is a combined initiative of the Ontario Court of Justice, the Ministry of the Attorney General for Ontario and the Criminal Lawyers' Association. I leave to others whether this Committee is an appropriate vehicle for consideration of the issues raised here.

<u>Recommendation 115</u>: Crown education on the limits of advocacy.

Educational programing for Crown counsel should contain, as an essential component, clear guidance as to the limits of Crown advocacy, consistent with the role of Crown counsel. These issues may also be the subject of specific guidelines in the Crown policy manual or a Code of Conduct.

A number of appellate decisions were filed with the Inquiry where Crown counsel's inappropriate conduct was addressed — improper closing addresses, cross-examination of witnesses (including the accused), etc. As noted by Mr. Culver in his Inquiry testimony, the line between appropriate and inappropriate Crown conduct is sometimes less than certain and may shift as the case law develops. Further, much of the conduct is not reflective of malevolence or deliberateness, but over exuberance, misappreciation of the law, carelessness or inexperience. However, Mr. Sherriff noted that the number of such reported cases has increased in recent years, causing

justifiable concern.

Recommendation 116: Adequacy of funding for defence counsel and prosecutors.

This inquiry has identified systemic problems which may be addressed through the recommendations made herein. However, these recommendations do not obviate the need for the proper functioning of the adversarial system. The success of the adversarial system in preventing miscarriages of justice largely rests upon the existence of well trained, competent prosecutors and defence counsel. This necessarily involves defence counsel who are adequately compensated for their work and who have adequate resources to ensure that appropriate investigative work is done and appropriate witnesses (particularly expert witnesses) are accessible. This also necessarily involves prosecutors whose work-load, environment, training, available resources and institutional supports permit them to perform at the highest level.

The most experienced Crown and defence counsel in Ontario have expressed their concern that the Ontario Legal Aid Plan and the financial resources allocated to criminal prosecutions by the Ontario government cannot be eroded to the point where the adversarial system is less likely to prevent miscarriages of justice. In this context, miscarriages of justice include the conviction of the innocent *and* the release of the guilty, due to inadequate resources.

a) The Government of Ontario bears the heavy responsibility of ensuring that the Ontario Legal Aid Plan and the Criminal Law Division of the Ministry of the Attorney General are adequately resourced to prevent miscarriages of justice.

b) The adequate education and training of Ontario prosecutors requires dedicated financial and other resources to ensure that all prosecutors are relieved from courtroom duties to attend educational programs and that such programs are comprehensive.

Mr. Durno was very critical of the current funding for the Legal Aid Plan. He pointed out that there is a constitutionally entrenched right to counsel, yet the number of hours currently provided to represent an accused do not allow for the effective assistance of counsel. He testified:

> [I]t's important that the trend that appears to be occurring in some of the courts to almost make it factory-like, running an assembly line, has to stop. There has to be adequate funding for both prosecution and defence, because if both prosecution and defence are represented by well-educated experts in their field who can make their own decisions, the system is going to be better served.

Ms. Welch testified that the Ontario Crown Attorneys' Association is fully supportive of a properly funded legal aid system:

> No Crown attorney enjoys or is comfortable prosecuting in circumstances where a person has inadequate representation, or indeed, no representation at all. ... [W]e think it's absolutely in the interest of justice that we have well-represented accused.

Crown attorneys expressed concerns about their own funding. The survey of Crown attorneys conducted by their Association reflected that 92 percent had genuine concerns with their ability to prepare their cases.

Ms. Welch also pointed out that current developments in the law have exacerbated the problem of inadequate resourcing:

> Resourcing ... has always been a problem within the criminal justice system. Speaking from my standpoint, and I think a number of Crowns who have been in the system for a long time recognise that the practice of criminal law has changed dramatically from the early 1980's with the advent of the Charter, with the *Stinchcombe* decision, *Askov*, the Martin Report. There's tremendous duties and responsibilities that have been placed on the membership.
>
> So this is not a new problem, but it's a problem that is increasing over time because there's this ever-increasing responsibilities and duties that are being placed on Crowns, and resourcing over the years. This is not a new phenomenon, but it's one that's becoming, I think, increasingly more and more critical to the effect of practice.

Mr. Culver agreed, commenting that any new initiatives must come

with adequate resources.

Recommendation 117: Creation of a Criminal Case Review Board.

The Government of Canada should study the advisability of the creation, by statute, of a criminal case review board to replace or supplement those powers currently exercised by the federal Minister of Justice pursuant to section 690 of the *Criminal Code*.

During the Inquiry, counsel for Mr. Morin, who was supported by counsel for AIDWYC, requested that I hear a panel of experts, specifically constituted to testify as to the adequacy of section 690 of the *Criminal Code* to redress the legitimate injustices of persons who have been wrongly convicted of offences that they have not committed. He argued that section 690 may be unconstitutional. He submitted that, under that section, the Minister of Justice is not able to give to the applicants' cases the consideration that they warrant, nor is the Minister empowered to provide the remedy that is merited. Both the Morins and AIDWYC contend that there are serious substantive and procedural problems with the present system that compel the substitution of an independent review board, created by statute. AIDWYC's written submissions to me outline, in some detail, not only the alleged inadequacies in the present regime, but also the blueprint for an independent review board.

The issue is not a new one. In 1989, the Marshall Inquiry made this recommendation:

> 1. We recommend that the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorneys General with a view to constituting an independent review mechanism - an individual or a body - to facilitate the reinvestigation of alleged cases of wrongful conviction.
>
> 2. We recommend that this review body have investigative power so it may have complete and full access to any and all documents and material required in any particular case, and that it have coercive power so witnesses can be compelled to provide information.

With some regret, I ruled that I would not hear a panel so constituted. Guy Paul Morin had not made application for relief under section 690 of the

Criminal Code, given the favourable disposition of his appeal before the Ontario Court of Appeal. Put succinctly, any inadequacies in section 690 did not arise in Guy Paul Morin's own proceedings, which is the subject matter of my mandate. As well, I note that the federal Minister of Justice did not have standing at this Inquiry. However, some evidence was adduced and submissions made that bore indirectly on the adequacy of that section. For example, Mr. Sherriff felt that such a body would help restore the integrity of the criminal justice system in the face of public concern over wrongful convictions. Mr. Durno believed that the availability of a review by a body independent of the government would be of enormous benefit. Mr. Wintory said this:

> I do agree very strongly ... that we should have a systemic capacity in our criminal justice system for collateral review and attacks on convictions, so that newly discovered evidence or evidence of ineffective assistance of counsel, or prosecutor's failure to disclose evidence can be identified and presented, and if found to have merit, result in new trials.

Mr. Hadgkiss testified that there has been movement in New South Wales, Australia, towards the creation of a criminal cases review body. A Bill has recently been introduced in the legislature to establish a reviewing body which will investigate matters referred to it by the Court of Appeal, the Governor or Attorney General, and refer cases to the Court of Appeal where it considers that there may have been a miscarriage of justice. The Bill also provides for the payment of compensation by the government in cases of miscarriage of justice.

As earlier noted, David Kyle was tendered as a witness by the Ontario Crown Attorneys' Association. The United Kingdom now has an independent criminal case review board entitled the Criminal Cases Review Commission. Mr. Kyle is a member of that commission. The commission was created by the *Criminal Appeal Act, 1995,* as a result of recommendations contained in the Runciman Report. It began operations on April 1, 1997. It currently has about 1,000 applications before it.

The mandate of the Commission is to review convictions, sentences, and special verdicts of insanity and unfit to stand trial. Applications are usually made by a convicted person after all normal appeal routes are exhausted. The Criminal Cases Review Commission determines whether the

case should be referred back to the Court of Appeal. The Commission can also bypass the Court of Appeal and refer cases to the Home Secretary where it feels a Royal pardon should be considered. Mr. Kyle was not sure what factors might lead to such a referral, but stated that Royal pardons tend to be given in circumstances where the Court of Appeal would be unable to interfere with the conviction.

Prior to the establishment of the Commission, applications by convicted persons who had exhausted their rights of appeal were made to the Home Secretary, who was empowered to refer cases back to the Court of Appeal. Mr. Kyle testified that the Commission performs essentially the same functions as the Home Office used to perform, but with an expanded jurisdiction to review summary conviction cases. Mr. Logan, however, testified that the power formerly vested in the Home Secretary was not often used because the Home Office was not a pro-active department, was not staffed by legally trained people, few applicants had legal representation because legal aid was not available, and the Home Secretary kept narrowing the criteria for sending cases back to the Court of Appeal. Mr. Kyle testified that the Commission regards itself as "having a very pro-active role to play, very much more than was the view taken when the responsibility for looking into this type of case rested with the Home Office." The powers given to the Criminal Cases Review Commission under the *Criminal Appeal Act*, and the resources and staff allocated to it, reflect that more pro-active role. He believed that the Commission has expanded the mandate of the Home Secretary to review cases because, in the past, the Home Secretary would only refer cases back to the Court of Appeal where there was new evidence which did not exist at the previous proceedings.

Reviews are usually initiated by a letter from a convicted person alleging a miscarriage of justice. The Commission then sends an application form to him or her, and screens any response. Mr. Kyle testified that it is too early in the life of the Commission to say how it will distill true applications from those which do not merit its attention. Legal aid funding has been approved for the presentation of applications.

The Court of Appeal is also permitted to refer cases to the Commission. Mr. Logan testified that such referrals are useful where the Court of Appeal has a matter before it and is not happy with the extent to which it has been investigated.

After a case is referred to the Commission, an investigative is ordered. The Commission has the power to formally appoint an investigating officer. Mr. Logan testified that two problems with this aspect of the Commission's work are that it has to rely on the police to carry out its investigations, limiting its direct control over the investigation, and funding for the investigation has to come from the police force concerned.

Mr. Kyle expected that in the future the Commission's own staff will carry out investigations on its own or with assistance from police officers who are not formally appointed as investigating officers. This will allow the Commission to retain direct control of the investigations. The Commission will ask police officers to do specified tasks and, consequently, the officers will not be exercising any expertise or judgment in carrying out those tasks. The Commission will, however, appoint an investigating police officer where the scale of the inquiry is such that it would not have the resources to undertake the investigation properly.

The Commission has ultimate authority to approve the investigating officer, and Mr. Kyle stated that its practice is to only appoint officers not involved in the original investigation (sometimes from another force). A different force would likely be retained in cases where there are allegations of substantial police misconduct in the original investigation. At all times, the Commission will supervise the investigation:

> So it isn't simply a question of handing the matter over to the police and saying: Please come back to us when you've done it. We are expected to supervise, control, direct the investigation, and right from the very outset, the expectation is that we will identify the terms of reference of the investigation. And we are allowed, and intend to do so, to give directions to the investigating officer as to what should be done.

Mr. Kyle stated that the members of the Commission see themselves in a much more inquisitorial than adversarial role. Investigations are carried out impartially, and the Commission will act on the results, whatever they may be.

Under the terms of its enacting legislation, the Commission should not send a case to the Court of Appeal unless there is a real possibility that the conviction or sentence would not be upheld, *i.e.* if the Court of Appeal

would think the conviction is unsafe. There is no definition of 'real possibility.' Mr. Kyle felt that the unsafe standard is wide enough to include the concept of there being a lurking doubt, and believed that the Commission would be prepared to send cases back to the Court of Appeal where there is such a doubt.

Mr. Logan testified that the problem with the Commission's criterion for referral to the Court of Appeal is that the Commission must then take its lead from the Court of Appeal. Mr. Kyle was unsure how the Commission's views of the Court of Appeal would affect its willingness to send cases to that Court for review:

> What I do say, and certainly, the way in which we are approaching our work in the commission, is that we intend to be very broad-based in the way we assess these cases, and we do intend to press at the boundaries in the way in which we deal with cases, and we will be looking to refer cases and to test and to extend the way in which they are dealt with by the Court of Appeal.

Since its inception, the Commission has completed 25 reviews and has referred six cases to the Court of Appeal. Two of the six referrals have involved persons who were convicted when the United Kingdom still had the death penalty and who were executed.

Based upon my ruling and the limited evidence I have heard, I am not able to make recommendations as to the existing or any proposed review mechanisms for cases involving potential wrongful convictions. However, the availability of an adequate review mechanism is an issue of great importance. I am able to recommend that the Government of Canada study the adequacies of the present regime and the desirability of a criminal case review board, drawing upon the representations of all interested parties.

Recommendation 118: Committee to Oversee Implementation of Recommendations.

The Government of Ontario should constitute a committee to oversee the implementation of recommendations contained in this Report which are accepted. Such a committee should issue periodic reports, which are publicly accessible.

Recommendation 119: Communication of recommendations to other governments.

The Government of Ontario, through its good offices, should facilitate the communication of these recommendations to the federal, provincial and territorial governments for their consideration.

Conclusion

This Report ends where it started. An innocent person was convicted of a heinous crime he did not commit. Science helped convict him. Science exonerated him.

We will never know if Guy Paul Morin would ever have been exonerated had DNA results not been available. One can expect that there are other innocent persons, swept up in the criminal process, for whom DNA results are unavailable.

The case of Guy Paul Morin is not an aberration. By that, I do not mean that I can quantify the number of similar cases in Ontario or elsewhere, or that I can pass upon the frequency with which innocent persons are convicted in this province. We do not know. What I mean is that the causes of Mr. Morin's conviction are rooted in systemic problems, as well as the failings of individuals. It is no coincidence that the same systemic problems are those identified in wrongful convictions in other jurisdictions worldwide. It is these systemic issues that must be addressed in the future.As to individual failings, it is to be hoped that they can be prevented by the revelation of what happened in Guy Paul Morin's case and by education as to the causes of wrongful convictions.

My conclusions should not be taken as a cynical or pessimistic view of the administration of criminal justice in Ontario. On the contrary, many aspects of Ontario's system of justice compare favourably to other jurisdictions. Most of its participants, police, forensic experts, Crown and defence counsel and the judiciary perform their roles with quiet distinction. These participants are justifiably proud of their roles in the administration of justice, and the roles performed by their colleagues. It is understandable, then, that a Report which focuses on systemic inadequacies may be viewed by some of them with dismay, if not frustration.

As several Crown counsel told me during the Inquiry, prosecuting someone who turns out to be innocent is a Crown attorney's "worst nightmare." I accept that. I also accept that no Crown counsel involved in this case, and no police officer involved in this case, ever intended to convict an innocent person. Although I have sometimes described the human failings that led to the conviction of Guy Paul Morin in very critical language, many of the failings which I have identified represent serious errors in judgment, often resulting from lack of objectivity, rather than outright malevolence.

The challenge for all participants in the administration of justice in Ontario will be to draw upon this experience and learn from it.

A particular challenge presents itself to the Government of Ontario. Some of the recommendations presented in this Report rely, for their efficacy, on the availability of resources. Indeed, some of the experienced counsel, Crown and defence, who testified at this Inquiry were concerned that the failure to allocate adequate resources will not only prevent the implementation of important changes, but result in more miscarriages of justice. As Mr. Wintory noted, the ability of the adversarial system to prevent miscarriages of justice relies on the existence of fully competent, fully resourced adversaries. In his context, miscarriages of justice include both the conviction of the innocent and the failure to apprehend and successfully prosecute the guilty. Adequate resourcing can only benefit the public of Ontario in the long term.

I am grateful to have had this opportunity to make recommendations for the improvement of the administration of criminal justice in Ontario. If this Report results in one less innocent person being charged, or prosecuted or convicted, it will have been worth the effort.

APPENDICES

Ontario

Executive Council
Conseil exécutif

O.C./Décret 1209/96

I hereby certify that the attached is a true copy of an Order made on June 26th, 1996, by His Honour the Honourable Henry Newton Rowell Jackman, B.A., LL.B, Lieutenant Governor of the Province of Ontario in Council.

Deputy Clerk, Executive Council of Ontario

Dated at Toronto,
August 27th, 1996

Ontario
Executive Council
Conseil des ministres

Order in Council
Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

Sur la recommandation du soussigné, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil des ministres, décrète ce qui suit :

the appended commission, made under the Public Inquiries Act, be approved.

Recommended _____
Attorney General

Concurred _____
Chair of Cabinet

Approved and Ordered JUN 26 1996
Date

_____
Lieutenant Governor

O.C./Décret 1209/96

COMMISSION OF INQUIRY

Christine Jessop was murdered on or after October 3, 1984. Guy Paul Morin was charged on April 22, 1985 with that murder. On February 7, 1986, he was acquitted. A new trial was ordered by the Court of Appeal for Ontario on June 5, 1987 and that order was affirmed by the Supreme Court of Canada on November 17, 1988. After the new trial, he was convicted of her murder on July 30, 1992. He was subsequently acquitted by the Court of Appeal on January 23, 1995 on the basis of fresh evidence tendered by the Crown and defence counsel. This course of events has raised certain questions about the administration of criminal justice in Ontario.

Under the Public Inquiries Act, R.S.O. 1990, c. P.41, the Lieutenant Governor in Council may, by commission, appoint one or more persons to inquire into any matter that the Lieutenant Governor in Council declares to be of public concern, if the inquiry is not regulated by any special law and if the Lieutenant Governor in Council considers it desirable to inquire into that matter.

The Lieutenant Governor in Council considers it desirable to inquire into the following matters which the Lieutenant Governor in Council declares to be of public concern. The inquiry is not regulated by any special law.

Therefore, pursuant to the Public Inquiries Act:

Establishment of the Commission

1. A commission shall be issued effective on June 26th, 1996, appointing the Honourable Fred Kaufman as commissioner under the designation "The Commission on Proceedings Involving Guy Paul Morin".

Mandate

2. The Commission shall inquire into the conduct of the investigation into the death of Christine Jessop, the conduct of the Centre for Forensic Sciences in relation to the maintenance, security and preservation of forensic evidence, and into the criminal proceedings involving the charge that Guy Paul Morin murdered Christine Jessop.The Commission shall report its findings and make such recommendations as it considers advisable relating to the administration of criminal justice in the province.

3. The Commission shall perform its duties without expressing any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization, and without interfering in any ongoing police investigation relating to the murder of Christine Jessop, or any ongoing criminal or civil proceedings.

4. The Commission shall complete this inquiry and deliver its final report containing its findings, conclusions and recommendations to the Attorney General by June 30, 1997. The Commission may give the Attorney General such interim reports as it considers appropriate to address urgent matters in a timely fashion. Each report must be in a form appropriate for release to the public, subject to the Freedom of Information and Protection of Privacy Act and other relevant laws.

5. To the extent that the Commission considers advisable, it may rely on any transcript or record of pre-trial, trial or appeal proceedings before any court in relation to the proceedings and prosecution and on such other related material as the Commission considers relevant to its duties.

IN THE MATTER OF the Commission on Proceedings Involving Guy Paul Morin, pursuant to Order in Council 1209/96

IN THE MATTER OF a ban on publication of the name of an individual known by the pseudonym Mr. X, or information leading to his identity, initially imposed by the Honourable Mr. Justice Donnelly on September 27, 1991 and continued by Order of the Honourable Chief Justice of Ontario, dated January 10, 1994;

Appearances :

Commission Counsel:	Austin M. Cooper, Q.C. Mary Anne Sanderson Mark J.Sandler
Mr. X:	David Humphrey
Guy Paul, Alphonse and Ida Morin:	James Lockyer Joanne McLean
The Toronto Star:	Paul Schabas

REASONS

I have been requested by the above parties to consider whether "the limited publication ban imposed by Mr. Justice Donnelly concerning Mr. X should be maintained." Some background will be useful.

Mr. X was called as a Crown witness in the first trial of Guy Paul Morin. Put briefly, he testified that in June 1985 both he and Mr. Morin were in custody at the Whitby Jail. One night shortly after Mr. Morin's committal for trial, he (X) was in a cell adjoining a cell occupied by Mr. Morin and another prisoner, Robert Dean May. According to Mr. X, he

overheard a conversation between Mr. May and Mr. Morin, in the course of which the latter confessed to having killed "that little girl." The precise words, as recounted by Mr. May and repeated by Mr. X were: "Fuck man, fuck. I killed her. I killed that little girl."

The following day, Mr. X and Mr. May saw a police officer involved in the case, with the result that both were called as witnesses for the Crown. It is clear from the evidence that both tried to obtain favours from the Crown, but any deal struck is not relevant at the moment and will be the subject of evidence.

Despite their evidence of this confession, Mr. Morin was acquitted, but a new trial was ordered by the Court of Appeal for Ontario, and this was confirmed by the Supreme Court of Canada.

In July 1991, in the pre-trial motion phase of trial No. 2, the Crown, on behalf of Mr. X and Mr. May, applied to the trial judge for orders banning publication of their names and/or information which would otherwise identify them. Judgment on the motions was reserved, and on September 27, 1991, Donnelly J. granted a ban on publication of Mr. X's identity or information leading to his identity, but declined to make a similar order with respect to Mr. May.

In support of the Crown's motion, Mr. X filed an affidavit which, in part, stated as follows:

1. That I am thirty years of age and have been married for eight years. I presently reside in Courtice with my wife and two children.

4. That I testified as a Crown witness at the first trial of Guy Paul Morin in January 1986. During cross-examination I was questioned regarding the specifics of my prior criminal record.

5. That the first trial of Guy Paul Morin was widely publicized. After I testified there were media reports which revealed my identity and the specifics of my prior criminal record.

6. That at the time I testified I was employed by Ontario Hydro at the Darlington Generating Station. This facility employs approximately 4,000 people. Prior to my testimony being reported by the media, I had no reason to believe that any of the employees at the plant were aware of my criminal record.

7. That after my testimony in the first trial was reported in the media, it became clear that my co-workers had become aware of the specifics of my prior criminal record.

8. That on my first day back at work the assistant foreman told me that he would kill me if I tried to speak to him. Prior to this I had never been threatened in any way by people at work.

9. That during the next two years I was subjected to repeated threats and harassment. On one occasion some of the employees unsuccessfully attempted to burn me by placing lit paper towels on the seat of a wooden bench on which I was sitting. There were also occasions when lit cigarette butts were thrown into the hood of my parka. On one occasion a fellow employee filled a bucket with bolts, yelled "diddler" at me, and then poured the bolts down on me from above.

10. That there were frequent occasions when notes would be posted around the Hydro Plant stating that if I did not "get out" I would be "dead". On several occasions these notes stated that there was a "reward" for breaking my legs, arms or jaw. In many of these notes I was referred to as being a

"diddler" or a "rat".

11. That the threats and harassment lasted over a two year period. Finally, in January, 1988, I suffered a nervous breakdown because of the relentless pressure. I was unable to return to work due to the unbearably stressful atmosphere. After a four month absence from work, my employment at Ontario Hydro was terminated.

12. That when I testified at the first trial of Guy Paul Morin I was residing in Oshawa. Prior to testifying I had a warm and friendly relationship with my neighbours. However, after the specifics of my criminal record were published in the media, my relations with my neighbours soured. My neighbours openly showed hostility towards to me, and to a lesser extent towards my family. The relations with our neighbours became so strained that my wife and I decided that it would be best for the family to move out of the neighbourhood, In February, 1990, we moved to our present residence in Courtice.

13. That I am apprehensive about having to testify as a witness in the pre-trial of Guy Paul Morin. I fear that if there is further publication of my identity and the specifics of my prior criminal record, I would again be subjected to reprisals, including the type of threats and harassment that I suffered as a result of testifying at the first trial. I fear that such publication would jeopardize my physical and emotional well-being and would also jeopardize the safety and well-being of my wife and two children.

(Exhibit 69, Affidavit of Mr. X.)

This was enlarged upon in *viva voce* testimony, and I propose to quote but one brief exchange:

Q. So would it make you feel more at ease, more comfortable to give evidence at this trial, if you knew that your name and identity wouldn't be published?

A. Yeah, it would be a lot more relaxed. I feel that I probably

> wouldn't be under as much pressure.
>
> (Transcript of Proceedings, July 24, 1991, Volume 149, p.39.)

The terms of the Order made by Donnelly J. were as follows:

> There will be an order that neither Mr. [X's] name nor information leading to his identity shall be published in any form by the print, television or radio media. It follows that, to ensure no adverse inference is drawn relative to this order, publication of the fact of the making of the Order is similarly prohibited.
>
> (Reasons on Ruling, September 27, 1992, Volume 172, p.400.)

In his reasons, Donnelly J. quoted at length and with approval from *R.v. McArthur* (1984), 13 C.C.C. (3d) 152 (Ont. H.C.J.), where Dupont J. held at 155:

> A basic foundation rule in our administration of justice requires that our courts conduct trial proceedings in public. The principle finds its origin in the common law but is confirmed in s.442 (1) of the Code that I have just referred to. It has repeatedly been recognized that the ability of the public to keep abreast, remain acquainted with and to scrutinize judicial proceedings provides, undoubtedly, one of the main safeguards of the integrity of our system. It is the surest security to fair and just administration of justice. This "open door policy" as it has been referred to, must admit to a few exceptions if public respect and confidence is to be maintained. The very strength of our system is based primarily on the law *per se* but also by the power of the law brought about by the trusted confidence of the general public of such system. Any deviation from full disclosure of such proceedings must be restricted to the most meritorious and/ or extraordinary compelling circumstances.

After reviewing the particular facts of the case, the learned trial judge concluded as follows:

> Considerations bearing on whether this is a proper case to foreclose,

to some extent, public scrutiny of an important criminal trial by exercise of judicial discretion are: the interests of justice, both in this case and as a continuing process; the interest of the accused and the risk of prejudice to his constitutional right to a fair and public trial; the interest of the public in having free access to information about the administration of justice, and also the interest of the witness.

There is an important societal interest in encouraging a flow of information from prison inmates about crimes. That same policy consideration applies even though the informant is no longer an inmate.

Notwithstanding that some portion of Mr. X's difficulty is undoubtedly attributable to the nature of his criminal record, his evidence did demonstrate, firstly, the conduct of former jail inmates toward him, after both Mr. X and those former inmates had been discharged from custody, and, secondly, the impact that publication of his testimony had on his life. A reasonably strong case was made out that his safety was at risk following the first trial. The attitude of his neighbours became hostile, although not violent, upon publication of his testimony and criminal record.

A further consideration applying to both May and X is the delivery of their psychiatric records to the defence pursuant to an order of this court. Currently that information is not available to the public. Mr. X's records do relate to sexual dysfunction and the causes underlying his crimes. A thorough credibility attack grounded in part on those psychiatric records can reasonably be anticipated. There is some significance that Mr. X is before the court through happenstance, as a witness and not as an accused, and as a witness for the second time on the same issue. But for coming forward with this testimony, those records would be protected from public scrutiny by the privacy interests created under the Mental Health Act.

The real effect of the publication on Mr. X's identity following his testimony was to jeopardize his safety. His experience went far beyond embarrassment and humiliation. Mr. X is an important witness in a serious criminal trial. By the nature of his testimony, it will draw extensive media coverage. His actual experience supports his expressed concerns. Mr. X testified that he would give evidence on the retrial more comfortably if his identity was not to be published. Although the particular neighbours have moved and Mr. X no longer works at Ontario Hydro, there is a reasonable

> expectation of continuing risk if his testimony at the re-trial is publicized under his name. There was no sufficient change of circumstances demonstrated to support a belief that a similar societal aversion will not recur. The issue does transcend Mr. X's self-interest and does affect the administration of justice, warranting departure from the established rule of full publication.
>
> (Reasons on Ruling, September 27, 1992, Volume 172, pp.397-99. In compliance with the ban, I have substituted X for the applicant's real name.)

I note in particular the trial judge's concern with the fact "that he [Mr. X] would give evidence on the re-trial more comfortably if his identity was not published." However valid that concern may have been at the time of the trial, this consideration has now, of course, disappeared.

Mr. Humphrey very ably submits that, despite the passage of time, very little has changed with regard to Mr. X's circumstances and that the concerns expressed by Donnelly J. (with the possible exception of 'comfort') are as valid today as they were in 1991. Furthermore, the Order is still in effect, and will remain so until varied by a competent authority. Finally, as Mr. Humphrey points out, the ban on publication was "continued" by Order of the Chief Justice of Ontario on January 10, 1994.

Mr. Humphrey asks (and I take this from the conclusion of his factum) that the ban be maintained, and he submits that "there exists no compelling reason requiring that it now be set aside." (This latter remark, I might say, was in reply to a suggestion made by Mr. Lockyer that I, in my capacity as Commissioner, apply to have the ban removed.)

Mr. Humphrey's submission that the ban ought to be maintained is strongly opposed by counsel for the Morins, who advances a number of reasons why the time has come to lift the ban. Among them:

1. Permitting 'jailhouse informants' to hide behind orders of anonymity prevents the gathering of data to identify repeated jailhouse informants, a problem which recently came to light in the Ontario case of *R. v. Frumusa* (heard by the Court of Appeal for Ontario on October 22, 1996; written reasons not yet released);

2. Publication of an informant's name can lead to other witnesses coming forward, and indeed that is what happened as a result of publication of Mr. May's name;

3. The rationale for a publication ban disappears when the evidence suggests that the person requesting the ban has lied;

4. Circumstances have changed since the second trial;

5. Mr. X has 'manipulated' the system.

It is unnecessary for me to expand on these themes, as Mr. Lockyer very forcefully did, because, as was conceded by all, I do not have the jurisdiction to set aside the ban. Who does is another question, and when I canvassed the opinion of counsel, three possibilities emerged: (1) the trial judge, (2) the Court of Appeal, and (3) the Supreme Court of Canada. Clearly, the question is not without doubt and there is authority to support each of the three propositions.

Since I cannot lift the ban — and I leave aside for the moment the question whether I would

if I could — I must consider Mr. Lockyer's suggestion that I apply to a competent authority to do so. Commission counsel do not share this view. With respect, neither do I. My reasons for declining this invitation are two-fold: (1) since I was not a party to the proceedings before either Donnelly J. or the Court of Appeal, I may have no standing before either tribunal; (2) to address myself to the Supreme Court of Canada, as *Dagenais v. Canadian Broadcasting Corp.* (1994), 94 C.C.C. (3d) 289, would seem to suggest I could do, might well mean months of delay for the Commission, a delay which I cannot afford since my mandate expires on June 30, 1997.

My position may be distinguished from that of Guy Paul Morin who not only was a party to the criminal proceedings before Donnelly J. and the Court of Appeal for Ontario, but was invited by the Chief Justice of Ontario to bring a later application to set aside the ban on publication. Put succinctly, Guy Paul Morin may well have a far more expeditious route to address the existing publication ban than any route that I or, for that matter, the media, might have.

This is not to say that the issue is not of sufficient importance to warrant an application to the appropriate court; I simply say that, in my view, it is not I who should make the application, particularly since the Commission can carry on its work even if the ban were to remain.

Mr. Lockyer and Mr. Schabas suggest another possible course, and that is for me to rule that

the Commission is a new proceeding of an independent nature and is not, therefore, bound by an order made in the course of Mr. Morin's second trial. I have considered this possibility but, as Mr. Cooper accurately pointed out, the very Terms of Reference of this Commission are so inextricably linked to the evidence at trial that it would be futile to think that the work of the Commission could be carried out without breaching the Order made at the trial which, as I have already indicated, is valid until set aside or varied.

By way of illustration, I expect that Commission counsel will file, at the commencement of the public hearings, the public record of the criminal proceedings (which the Order in Council directs me to rely upon, to the extent possible) including the evidence of Mr. X at the second trial. With respect, despite the acknowledged differences between the criminal trial presided over by Donnelly J. and the nature and function of this inquiry, it cannot be maintained that the publication of that evidence, using Mr. X's true name, would not fall within the scope of the Court-imposed publication ban.

For these reasons I will neither bring the application nor consider this inquiry a proceeding so far removed from the Court-imposed Order as to be beyond its reach.

That, however, is not the end of the matter because I feel that any Court which may be seized of an application to set aside the ban is entitled to my view on the issue. This may sound presumptuous, and perhaps it is, but it is based on the conclusion of Cory J., speaking for three members of the Supreme Court of Canada in *Phillips v. Nova Scotia (Commission of*

Inquiry into the Westray Mine Tragedy) (1995), 98 C.C.C. (3d) 20, where he said (at 83 in relation to publicity bans in an inquiry), "it is the commissioner who should first determine whether such exceptional orders should be issued."

I agree with Mr. Lockyer that "this [the application] is now and that [the ban] was then." In particular, I note that no evidence was led before me reflecting that Mr. X's present circumstances support, in any way, the maintenance of the ban of publication over five years after it was imposed. In addition, in oral argument, Mr. Humphrey was asked by me whether he would be requesting that I impose a ban of publication pursuant to my powers as Commissioner, should I hold that the Court-imposed ban did not extend to this inquiry. He candidly stated that he would not be asking for such a ban of publication. I can only infer that Mr. X is in no position now to tender evidence to justify a present ban on publication.

Further, as I mentioned above, Donnelly J. emphasized that Mr. X would be more 'comfortable' giving evidence surrounded by a cloak of anonymity. That reason has now disappeared. Second, when the ban was imposed, Mr. Morin was on trial, accused of first degree murder. Since then he has been conclusively cleared of the charge. Third, the criteria determinative of discretionary publication bans have changed since the Order of Donnelly J. was imposed.[1]

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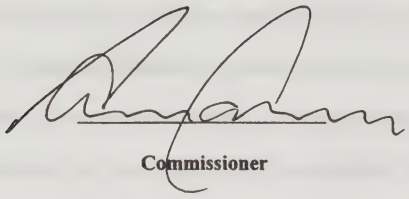
1. See, for instance, *Dagenais v. Canadian Broadcasting Corp.*,*supra,* and, in particular, the remarks of Lamer C.J.C. at 317.

Mr. Humphrey submitted that if the ban were to be lifted, the public at large would be in a position to identify the victims of Mr. X's sexual assaults. However, it is significant that on March 4, 1992, Donnelly J. imposed a separate ban on the publication of the identity of the victims or information leading to their identity. I am not persuaded that lifting the ban of publication relative to Mr. X undermines that separate, more narrow ban. Interestingly, it was not suggested to me that a ban on publication was sought or imposed in relation to Mr. X's victims in the course of *his* criminal proceedings. Further, the Attorney General of Ontario has not sought to make representations on the hearing before me. Mr. Humphrey also submitted that Mr. X, as a victim himself of sexual abuse, was entitled to protection. Again, no suggestion was made that a ban on publication was imposed in favour of Mr. X when the criminal proceedings relating to his victimization were held.

Another concern of Mr. Humphrey's client is his privacy interest in certain records pertaining to mental health problems he had. I agree that this is a consideration but, in the totality of circumstances, I find this not determinative in favour of Mr. Humphrey's position.

In the result, I am of the view that the ban has outlived its usefulness, and I would, if I could, lift it. Further, if one of the parties were inclined to bring an application to a court of competent authority to set aside the ban on publication (which, as I previously indicated,

may involve a more expeditious route), I would instruct my counsel to appear on such an application and, if granted standing, reflect my views, as expressed above, as to the merits of the application.



Commissioner

Released November 29, 1996

Metropolitan Toronto Police

The Commission on Proceedings Involving Guy Paul Morin
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180 Dundas Street West
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The Hon. Fred Kaufman, Q.C.
Commissioner

Commission sur les poursuites contre Guy Paul Morin
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L'hon. Fred Kaufman, c. r.
Commissaire

Ontario

January 31, 1997

Detective Sergeant Neale T. Tweedy
Project 5-J Jessop Murder Task Force
Metropolitan Toronto Police
8th Floor
320 Front Street West
Toronto, Ontario

Dear Detective Sergeant Tweedy:

Enclosed with this letter is a Summons to Produce Documents which I have issued pursuant to my authority under sections 7(1)(b) and 11 of the *Public Inquiries Act* R.S.O. 1990, c.P.41.

I understand that you have met with my counsel with respect to the production of documents, and that you have particular concerns about protecting the privacy interests of members of the public whose names may appear in some of these documents, as well as with any interference with the ongoing investigation into the murder of Christine Jessop.

I wish to assure you that I am fully cognizant of the difficult and important concerns which you have raised with my counsel. As you know, section 3 of the *Public Inquiries Act* vests "control and direction" of "the conduct of and the procedure to be followed on an inquiry" directly in the Commissioner. The Order in Council which established this commission of inquiry further states that the Commission must "perform its duties...without interfering in any ongoing police investigation relating to the murder of Christine Jessop, or any ongoing criminal or civil proceedings."

In addition, section 4 of the Act empowers me to hold hearings in the absence of the public where I determine that "intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public."

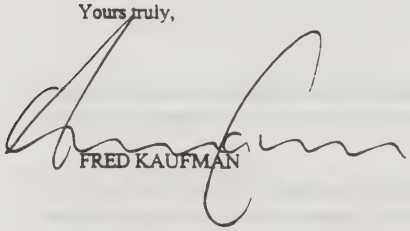
It is my intention to ensure that this aspect of my mandate, as with all others, is scrupulously adhered to. Furthermore, I intend to make it abundantly clear to all

parties that the disclosure to them of any material not previously a part of the public record will only be made in the context of procedures established to protect the privacy interests of any individuals whose identity is revealed in the material. If necessary, I may make an order that will reflect those concerns at the commencement of the public hearings. The documents respecting which you have expressed concerns will not simply be made available to the public.

I have instructed my counsel to notify counsel to the Metropolitan Toronto Police Force if and when an issue arises in the course of the hearings on which you, through your counsel may wish to be heard, and I will be pleased to entertain submissions at that time.

May I express my gratitude for the professional and courteous manner in which you have assisted my counsel to date.

Yours truly,



FRED KAUFMAN

IN THE MATTER OF THE PUBLIC INQUIRIES ACT R.S.O. 1990, c. P.41

SUMMONS TO PRODUCE DOCUMENTS
Sections 7(1)(b) and 11

RE: The Commission on Proceedings Involving Guy Paul Morin

TO: Detective Sergeant Neale T. Tweedy
Project 5-J Jessop Murder Task Force
Metropolitan Toronto Police
8th Floor
320 Front Street West
Toronto, Ontario

You are hereby summoned and required to provide to the Commission on Proceedings Involving Guy Paul Morin, at 180 Dundas Street West, 22nd Floor, in the City of Toronto, on or before the 3rd day of February, 1997, at 10 o'clock in the forenoon, the following documents relevant to the subject matter of the said Commission, not inadmissible in a court by reason of any privilege under the law of evidence, the production of which would not interfere in any ongoing or unrelated police investigation relating to the murder of Christine Jessop, or any ongoing or unrelated criminal proceedings:

(1) Computer generated copies of Supplementary Reports produced in the course of the investigation;

(2) Photocopies of note books of Detectives John Shephard and Bernie Fitzpatrick, kept during the course of their investigation into the murder of Christine Jessop;

(3) Photocopies of other documentation relating to the involvement of Robert Dean May and [redacted] in the investigation and prosecution of Guy Paul Morin as outlined in correspondence to you dated January 8, 1997.

(4) Original documentation as follows:

(i) records generated by or at the Whitby Jail;

(ii) photographs and diagrams of the Whitby Jail;

(iii) photographs taken at Ontario Hydro re [redacted] (exhibits 205 to 205-16);

(iv) taped conversation between Robert Dean May and Guy Paul Morin (Exhibit 302-01);

(v) charts filed as exhibits at trial showing relevant locations, distances and routes.

Dated this 31st day of January, 1997.

Commission on Proceedings Involving Guy Paul Morin

The Hon. Fred Kaufman Q.C.
Commissioner

NOTE:
If you fail to produce the documents or things specified, at the time and place specified, without lawful excuse, you are liable to punishment by the Ontario Court (General Division) in the same manner as if for contempt of that Court for disobedience to a summons.

Metropolitan Toronto Police
40 College Street, Toronto, Ontario, Canada. M5G 2J3
(416) 808-2222 FAX (416) 808-8202

David J. Boothby
Chief of Police

To Serve and Protect
Working with the Community

File Number: ---------

The Hon. Fred Kaufman Q.C.
Commissioner
Commission on Proceeding Involving
Guy Paul Morin
22nd Floor
180 Dundas Street West
Toronto, Ont. M5G 1Z8

February 3, 1997

Dear Commissioner Kaufman,

This morning, I received your summons to produce documents and your letter addressing the concerns I expressed previously to your counsel, regarding the sensitive issues surrounding the disclosure of materials in my possession that are required for your Inquiry.

Firstly, let me tell you that I appreciate the time you and your counsel have taken to address my concerns regarding this matter and your careful conciliatory approach. The patience demonstrated by your counsel and staff have certainly contributed to us finding amicable solutions to the many issues that have arisen. I am of the view that the success of both our projects is of the utmost importance to the Administration of Justice and while sometimes difficult, finding the correct balance that satisfies our individual mandates will be the continuing goal.

Throughout today and tomorrow, the material you require will be provided to your Commission. I expect there will be continuing requests as your work continues and I will do my utmost to satisfy each and every request in a timely fashion. If by circumstance a problem arises, I take comfort in knowing your counsel and I have no difficulty in communicating and I feel the level of understanding to be high. I very much value the tone of the discussions and your team's sincere concern for the welfare of the criminal investigation.

Respectfully,

Neale T. Tweedy
A/Detective Inspector
Jessop Murder Task Force

IN THE MATTER OF The Commission on Proceedings Involving Guy Paul Morin, pursuant to Order in Council 1209/96

IN THE MATTER OF Applications for standing, pursuant to Section 5 (1) of the *Public Inquiries Act*, R.S.O. 1990, c. P.41

Appearances:

Commission Counsel:	Austin M.Cooper, Q.C. Mary Anne Sanderson Mark J. Sandler
Association in Defence of the Wrongly Convicted	Melvyn Green
Attorney General of Ontario	Robert E. Charney
Canadian Bar Association - Ontario	William J. Simpson Daniel J. Brodsky
Centre for Forensic Sciences, Chief Coroner and Ministry of the Solicitor General and Correctional Services	Dennis Brown, Q.C.
Chief Bryan Cousineau	Phyllis Carlyle
Criminal Lawyers Association	Michael Lomer
Durham Regional Police Association, Thomas Cameron, Robert Chapman, Joseph Loughlin and David Robinet	Ian J. Roland
Durham Regional Police Services Board and Robert Brown	David J.D. Simms
Bernie Fitzpatrick	Paul D. Stunt
Gordon Hobbs	Paul D. Stern
Janet and Kenneth Jessop	Peter Danson
The Law Union of Ontario	Paul D. Copeland Robert Kellermann

Susan MacLean	Michelle K. Fuerst
Leo McGuigan, Q.C. and Alex Smith	Earl J. Levy, Q.C.
Michael Michalowsky	Bernie F. O'Brien
Guy Paul, Alphonse and Ida Morin	James Lockyer Joanne McLean
Nelson Mandela Academy of Applied Legal Studies	Munyonzwe Hamalengwa
Ontario Crown Attorneys Association	Paul Vesa
John D. Scott, Q.C.	Robert P. Armstrong, Q.C.
John Shephard	Edward L. Greenspan, Q.C.
York Regional Police Association	Barrie Chercover

REASONS

THE HONOURABLE FRED KAUFMAN, Q.C.

Section 5(1) of the *Public Inquiries Act*, R.S.O. 1990, c. P.41, provides as follows:

> A Commission shall accord to any person who satisfies it that the person has a substantial and direct interest in the subject-matter of its inquiry an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by counsel on evidence relevant to the person's interest. (Emphasis added.)

What is a "substantial and direct interest"?

As Linden J. (speaking for the Divisional Court) said in *Re Royal Commission on the Northern Environment* (1983), 144 D.L.R. (3d) 416 at 418,

> [i]t is clear that this legislation does not grant full participation rights to every single individual in the province who happens to be interested in an inquiry. The persons entitled to full participation are only those who have a "substantial and direct interest", not just anyone who has a mere academic interest which is neither substantial nor direct. It is not enough merely to be as interested as any other member of the public in this inquiry: see *Re Inmates Committee of Prison for Women et al. and Meyer* (1980), 55 C.C.C. (2d) 308.

He continued (at 419):

> There is very little guidance in the authorities as to the factors to be examined by the court (or a Commissioner) in determining this question. It does seem as though the subject-matter of the inquiry is of significance. Obviously, the more general, theoretical and abstract the subject of an inquiry is, the more difficult it would be to find that a person has a substantial and direct interest in it. The more specific, practical and concrete the subject of an inquiry is, the more likely it would be that the property or individual rights of a person are affected, and hence, he would have a substantial and direct interest. The potential importance of the findings and the recommendations to the individual involved would have to be considered; if a particular person would be greatly affected by a recommendation or a finding in relation to him or his interests, then that would be taken into account in deciding whether he had a substantial and direct interest.
>
> Essentially what is required is evidence that the subject-matter of the inquiry may seriously affect an individual. If that is the case, then that individual is entitled to full participation rights pursuant to s. 5(1).

These criteria may also be applied to groups and organizations, and by permitting them to participate in the proceedings the Commission will have the benefit of a wide variety of views representing a broad spectrum of society.

However, even where standing is granted, as Linden J. noted (at 421):

> [This] does not mean that every single time the council [the organization in question] wishes to produce a witness or ask a question in cross-examination that they have the right to do so indiscriminately. The commissioner remains in charge of the inquiry. He is in control of its process, thus he is obligated to rule on the relevance of any questions to the interest of the council (or such other individuals as are given standing).

In the present inquiry, the subject-matter, as defined by the Order in Council, is "the conduct of the investigation into the death of Christine Jessop, the conduct of the Centre for Forensic Sciences in relation to the maintenance, security and preservation of forensic evidence, and ... the criminal proceedings involving the charge that Guy Paul Morin murdered Christine Jessop." To this I would add my duty, as spelled out in the Order, to "make such recommendations as [I consider] advisable relating to the administration of criminal justice in the province."

With that in mind, I granted a number of applications for standing at the hearing on September 4, 1996. These were the cases of individuals and organizations whose interest not only was "substantial and direct", but also clear and unequivocal. For the record, they were (in alphabetical order): the Attorney General of Ontario, the Centre for Forensic Sciences and persons employed by or associated with the Centre, the Chief Coroner and persons employed by or associated with that office, Bernie Fitzpatrick, Gordon Hobbs, Janet and Kenneth Jessop, Susan MacLean, Leo McGuigan, Q.C., Michael Michalowsky, Guy Paul, Alphonse and Ida Morin, John D. Scott, Q.C., John Shephard, Alex Smith, and the Ministry of the Solicitor General and Correctional Services and persons employed by or associated with the Ministry. These persons and

organizations are represented by a total of 13 lawyers and they have full standing, subject only to the limitations noted by Linden J. above.

The remaining ten applications required some thought, first because I had to examine each applicant's degree of interest -- is it substantial and direct? -- and, second, because I had to consider the interrelationships between the various groups and organizations and the role which each should properly play in the inquiry. The concern was also expressed by various counsel who had already obtained standing that if all applicant groups were given standing, the proceedings would extend indefinitely. This is a valid concern but, in my view, it cannot operate to deprive an applicant organization which has a direct and substantial interest of its statutory rights. As will be reflected below, this concern can better be addressed in another way.

With that in mind, I will now deal with the outstanding applications in the order in which they were heard.

ASSOCIATION IN DEFENCE OF THE WRONGLY CONVICTED (AIDWYC)

While at first it would appear that counsel appearing for Guy Paul Morin can (and will) adequately (and vigorously) represent not only the interests of his client, but also what I might call the "wider point of view", it is, as I said in my opening remarks, my hope

to make recommendations which may help prevent future failures of the criminal justice system in Ontario. Or, as Mr. Morin said that day: "Hopefully, future Guy Paul Morins won't arise." To achieve this result, the Commission must look beyond the case which triggered the inquiry, and some of the organizations which have applied for standing may be of help to me in this regard. Of course, they must demonstrate their interest, but if I were to err in my assessment of an applicant's interest, I would prefer to do so in favour of inclusion rather than exclusion, particularly since I will need input from persons and groups with a diversity of interests and points of view.

As pointed out by its counsel, AIDWYC is the formal successor to an informal group which was formed after Guy Paul Morin's conviction. It was this group which canvassed the community to see if Mr. Morin's release on bail would pose problems were he to return to his home and, as Catzman J.A. said in his order granting the application for interim judicial release, affidavits gathered by this group

> establish[ed] to my satisfaction that, certainly in the community which was home both to the appellant and to the deceased and to which the appellant seeks to return pending the disposition of his appeal, considerations of public confidence in the administration of justice and public respect for the determination of the appellant's guilt do not uniformly support his continued detention pending appeal and there is a significant body of opinion within that community that supports his release and return until his appeal has been decided.

But, even more importantly, AIDWYC has demonstrated a continuing interest and involvement in issues relating to the wrongful conviction of innocent persons (which

is the principal concern of this inquiry) and, as such, it has a substantial and direct interest in addressing, in a systemic way, how innocent persons come to be charged and convicted, and this with a view to preventing such miscarriages of justice in the future. I therefore grant the application for standing, but I do so with this limitation: I will permit AIDWYC to participate in the work of the Commission on issues which deal with the Association's substantial and direct interest, namely systemic or general failings in the administration of criminal justice.

I considered limiting AIDWYC's and other applicants' standing to those phases of the inquiry which might directly address such systemic or general issues. However, as I pointed out at the hearing, the phases are, at present, tentative and may be modified, for example, to deal with certain subject matters at one time, rather than in a chronological format. Accordingly, rather than limit standing to specific phases, I have chosen to reflect that AIDWYC's ability to examine, cross-examine or call evidence will be governed by the nature of its substantial and direct interest. In my view, this meets the objectives not only of AIDWYC, but also of parties already granted standing, some of whom expressed concern that parties adverse in interest could duplicate or repeat the efforts of others. Of course, AIDWYC and all other parties granted standing will be permitted to make closing submissions, orally or in writing or, perhaps, both, as may be later directed.

8

CANADIAN BAR ASSOCIATION - ONTARIO (CBAO)

This group seeks standing to participate in those phases of the inquiry which will deal with the administration of justice and policy issues, "not in a partisan role" and "without any desire to draw out this proceeding or to overlap."

I appreciate these self-imposed limitations and, bearing in mind the large segment of the legal community which the CBAO represents, standing is granted to the extent it is sought.

CRIMINAL LAWYERS ASSOCIATION

ONTARIO CROWN ATTORNEYS ASSOCIATION

Given the mandate of the Commission, these two associations represent groups of persons who are key players in the administration of criminal justice, and as such each has a substantial and direct interest in addressing systemic or general failings in the criminal justice system. I therefore grant the applications for standing, subject to the same limits imposed by me upon AIDWYC.

9

THE LAW UNION OF ONTARIO

I accept the fact, as presented by counsel, that this organization has a long record of appearing and presenting briefs before many different bodies, touching, sometimes, on points of view which otherwise might not be aired. I am not satisfied, however, that the Law Union's interests are substantial and direct within the meaning of the statute, and I therefore dismiss its application for standing throughout the inquiry. However, recognizing what counsel chose to describe as a non-establishment point of view, I give the Law Union standing, limited, however, to making representations at the conclusion of the inquiry.

NELSON MANDELA ACADEMY OF APPLIED LEGAL STUDIES

The Nelson Mandela Academy applies for full standing. It is a new group, formed earlier this year, and its mission, as set out in its charter, is, *inter alia*, "to offer the highest standards of teaching, research, and scholarship as practised in the wider community, in an environment conducive to creativity, to learning, and to freedom of thought, enquiry and expression." I am not satisfied, having regard to all the circumstances, that this group has a substantial and direct interest in this inquiry and the application is, therefore, dismissed.

10

DURHAM REGIONAL POLICE ASSOCIATION

DURHAM REGIONAL POLICE BOARD

YORK REGIONAL POLICE ASSOCIATION

YORK REGIONAL POLICE BOARD

Some distinctions must be made among these four organizations. In the case of the **Durham Regional Police Association** (which, in essence, is the police union), its counsel also has a mandate from four specific officers, all of whom, in my view, are entitled to full standing, and the application, insofar as it concerns these officers (Joseph Loughlin, Robert Chapman, Thomas Cameron and David Robinet) is granted. For the Association itself, I will permit participation to a limited degree -- and I am prepared in this case, as in all others, to revisit the question as the inquiry progresses -- the limit being issues relating generally to police officers and the performance of their duties. This shall also apply, *mutatis mutandis*, to the **York Regional Police Association**, whose counsel emphasized that his mandate was to represent not only the Association, but also individual officers whose conduct may be examined.

As I said before, concerns were expressed that common interests -- in this case police agencies -- may be unnecessarily and unfairly duplicated through the granting of standing to individual officers, associations and boards. In my view, they all have substantial and direct interests which must be recognized. However, should such duplication occur, it will be addressed by limiting participation in the way I have earlier

outlined.

Insofar as the two boards are concerned, counsel for the **York Regional Police Board** informed the Commission that, at this point, her mandate was not for the Board, but rather for the Chief of Police. I therefore grant standing to the Chief and to the Board, if so requested by the latter in writing, limited, however, insofar as the Board is concerned, to institutional issues. The application of the **Durham Regional Police Board** is granted, subject, however, to its participation being confined to institutional issues or to those senior officers whose conduct may be addressed and who are not represented by the Association.

I would like to add this: It is my hope that the work of the Commission will proceed efficiently and with dispatch, but this can only be achieved with the full co-operation of all the parties concerned. Commission counsel will do their utmost to lead all the evidence necessary to carry out the objectives, and they will welcome suggestions from counsel for the parties granted standing. I have spelled out some limitations, and my purpose in doing so is to avoid costly and time-consuming duplication and prevent unfairness. I know I can count on the help of all parties to achieve this result.



Commissioner

Released: September 25, 1996

IN THE MATTER OF the Commission on Proceedings Involving Guy Paul Morin, pursuant to Order in Council 1209/96

IN THE MATTER OF further Applications for standing, pursuant to Section 5 (1) of the *Public Inquiries Act,* R.S.O.1990, c.P.41

Appearances of Counsel making submissions on standing:

Commission Counsel:	Austin Cooper, Q.C. Mary Anne Sanderson Mark J.Sandler
York Regional Police Board	Phyllis Carlyle
Mr. "X"	David Humphrey
Thomas Cameron	H.G.Black, Q.C.
Guy Paul, Alphonse and Ida Morin	James Lockyer

REASONS

I must deal with two further applications for standing.

The first is from the York Regional Board. In my reasons given on September 25, 1996, I alluded to the applicant, and said that standing would be granted if requested in writing. This request has now been received, and it was reiterated by the Board's counsel at the public hearing held on October 31,1996.

In the result, the York Regional Police Board is granted standing, subject, however, to its participation being confined to institutional issues or to those senior officers whose conduct may be addressed and who are not represented by the York Regional Police Association.

The second application, again first made in writing and then repeated orally at the last public session, comes from Mr."X". The reason, at the moment, for disguising the applicant's true name is that the judge at the Mr. Morin's second trial, where Mr."X" was a witness, issued a ban on the publication of the applicant's name, which I intend to observe until argument is directed to this specific issue, and a hearing for this has been set for November 26th, 1996. In the meantime the applicant will continue to be called, as he was at the trial, Mr."X".

Mr."X" seeks limited standing, but this is contested by Mr. Lockyer, acting for the Morin family. He suggests that the application should be granted only in case the Commission decided to send Mr."X" a section 5 Notice. Mr. Humphrey, on the other hand, thinks his client should have standing regardless of whether a Notice is sent or not, but he agrees, of course, by the very terms of his application, that his participation should be limited to matters of direct concern to his client.

It is my view that Mr."X" has a 'direct and substantial interest' in at least one phase of the inquiry, and I therefore grant him standing, limited, however, to the phase of the inquiry which directly concerns him.

There is one other matter that I should deal with, and I can do so shortly. Mr. Roland originally appeared for the Durham Regional Police Association and for four officers. One of them, Thomas Cameron, has since chosen to have separate counsel, and he will henceforth be represented by Mr. Black.



Commissioner

Released November 12, 1996

The Commission on Proceedings Involving Guy Paul Morin

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L' hon. Fred Kaufman, c. r.
Commissaire

Ontario

SENT BY FAX: 613-728-9866

January 23, 1997

Mr. William Simpson, Q.C.
Stierney, Stauffer
Barristers & Solicitors
175 Holland Avenue
Ottawa, ON
K1Y 0Y2

Dear Sir:

After our last public hearing, I understand that counsel for the Criminal Lawyers' Association, Crown Attorneys' Association, AIDWYC and the Canadian Bar Association met with commission counsel to discuss funding issues. In the course of that meeting, Mr. Brodsky indicated to commission counsel that you would appreciate some clarification of my reasons for granting standing, most particularly, as to the scope and nature of the Canadian Bar Association's participation.

As you know, I granted standing to several organizations on, essentially, systemic issues. These organizations fall into two categories: (1) police-related entities, such as boards and associations and (2) the associations noted above.

Witnesses who testify at the public hearing may relate directly to the investigation and prosecution of Guy Paul Morin, or may give "systemic evidence" as to present or potential practices or reforms. "Systemic" witnesses may testify during the systemic evidence phase or, on occasion, during the phases to which their evidence directly relates. Systemic issues may also be addressed in less formal ways; for example, commission counsel may distribute discussion papers on various topics and invite counsel, together with experts, to discuss the topics raised.

I look forward to the participation of all of the organizations above when systemic witnesses are called, when systemic issues may be less formally addressed and, of course, during closing submissions. Of course, that participation must relate to the organization's direct and substantial interest and should not duplicate the efforts of other counsel, including commission counsel.

The Canadian Bar Association applied for and obtained standing for the systemic phase of the inquiry and to make systemic-based submissions. As I reflected in my reasons for granting standing, the Canadian Bar Association was granted precisely what it asked for. In my view, this standing is confined to the participation noted immediately above.

It may be that systemic evidence will be elicited from witnesses whose primary evidence relates directly to the investigation and prosecution of Guy Paul Morin. Accordingly, the issue may arise as to the extent to which the above organizations, including the Canadian Bar Association, will be permitted to cross-examine "Morin-related" witnesses on systemic issues.

It was never contemplated by me that the Canadian Bar Association would be permitted to cross-examine "Morin-related" witnesses on systemic issues. As I have noted, this was not the standing requested.

I have drawn some distinctions between the Canadian Bar Association's standing and that granted to other organizations on systemic issues. It may be that the other organizations will, on occasion, be permitted to cross-examine "Morin-related" witnesses solely on systemic issues. I do not intend to rule on the extent that such organizations may do so at this time. I will have to exercise my discretion, based upon the nature and extent of the questioning sought, the examination on systemic issues already done by commission counsel or other parties, any submissions by counsel and mindful of the requirement of fairness to the witness or other parties. For example, I will not permit a cross-examination of a "Morin-related" witness, purportedly on systemic issues, which is, in reality, directed to undermining or supporting the witness' evidence on "Morin-related" facts.

Finally, I note that commission counsel would welcome (as would other parties to this inquiry), any suggestions that counsel for the Canadian Bar Association might have as to the questioning of witnesses.

I trust that the above is of assistance.

Yours truly,

FRED KAUFMAN

c.c. V. Condo (416) 327-5032
D. Brodsky (416) 960-5456

The Commission on Proceedings

Involving Guy Paul Morin

RULES of PRACTICE and PROCEDURE

Hearings

On dates to be determined by the Commissioner, the Commission will hold public hearings at 180 Dundas Street West, 21st Floor or at such other place as it directs. Hearings will generally be held on Monday to Thursday of each week until adjourned or completed, commencing at 10:00 A.M. and concluding at 4:30 P.M., with a break for lunch between 1:00 and 2:30 P.M.

The Commission is committed to a process of public hearings. The Commissioner may, in his discretion, in appropriate circumstances, conduct hearings in camera where he is of the opinion that matters involving public security may be disclosed, or if considering intimate financial, personal, or other matters that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure outweighs the desirability of adhering to the general principle that the hearings should be open to the public.

Further, the Commissioner may, in appropriate circumstances, direct that measures be taken to minimize the adverse affects of publicity and publication, and the adoption of measures designed to protect individual rights, including refusing permission to televise certain portions of the proceedings. Where the Commissioner decides to conduct hearings in camera, he will determine who will be permitted to attend the in camera hearings, and what conditions will be imposed upon anyone in attendance.

Preparation of Evidence

Parties should at the earliest opportunity provide to Commission counsel the names and addresses of all witnesses who they consider may have information relevant to the inquiry, together with copies of all relevant documentation which is not already part of the public record.

In addition, at the earliest opportunity, parties shall provide Commission counsel with any documents which they intend to file as exhibits or to which they intend to otherwise refer during the hearings, and in any event no later than 48 hours prior to the day the document will be referred to or filed.

Commission counsel may receive or examine documents subject to such confidentiality as they in their discretion may determine is consistent with the rules of natural justice and the provisions of Order in Council 1209/96.

Commission Counsel will provide reasonable access to any documents not already part of the public record which they intend to file as evidence before the Commission.

Witness Interviews

Any prospective witness interviewed by or on behalf of the Commission counsel is entitled to have his or her own counsel present.

The Evidence

The Order in Council provides that the Commission may rely on any transcripts or record of pre-trial, trial or appeal proceedings before any Court in relation to the proceedings and prosecution and on such other related material as the Commission considers relevant to its duties. At the commencement of the public hearings, a list of the documents, to which the Commission may refer at any time without further notice will be filed.

Witnesses will give evidence under oath or affirmation.

All evidence will be presented by Commission counsel except with leave of the Commissioner as hereinafter provided.

Except as otherwise directed, the order of examination for witnesses will be as follows:

(a) Commission counsel will adduce the evidence from the witness. Commission counsel may adduce evidence by way of both leading and non-leading questions;

(b) Subject to limitations arising out of the nature of their standing, parties will then have an opportunity to examine the witness. Subject to further direction of the Commissioner, the order of examination will generally be as follows:

- Counsel for the witness will examine next,
- Counsel with a substantial commonality of interest will examine next,

- Remaining counsel will examine next,
- Counsel for the witness will then re-examine,
- Commission counsel will have a right to re-examine.

Commission counsel have the discretion to decline to call any witnesses whose evidence would not appear to them to be relevant or to be within a subject area to be covered by other witnesses or where the evidence of the witness appears in a transcript filed at the inquiry. If, at the end of any phase of evidence, there are witnesses who parties believe should be heard from, and if Commission counsel has not called them, parties may request and the Commissioner may direct that Commission counsel call them as witnesses.

Section 5 Notices

Section 5 Notices will be delivered by the Commission after information about alleged misconduct has come to the Commission's attention which ***may*** give rise to findings of misconduct. These will be delivered on a confidential basis to the persons or parties to whom they relate. Supplementary notices may be delivered from time to time by the Commission as warranted by the information before it. Notices may be issued to persons who are not called as witnesses before the Commission.

At a specified phase of the inquiry to be determined by the Commission, if any party believes that it is necessary to adduce documentary evidence or to call evidence to respond to allegations of possible misconduct for which a notice under Section 5 of the *Public Inquiries Act* has been received, then that party may apply for leave to call that evidence or may request that Commission counsel call such evidence. If relevant and responsive to issues raised in the Section 5 Notice, leave will be given. Cross-examination of the witness by counsel for other parties shall be limited to matters adduced in evidence during the examination in chief of the witness except with leave of the Commissioner.

General Provisions

The use of the term "party" is intended to refer to those granted standing and is not intended to convey notions of an adversarial context.

The Commission is entitled to receive evidence which might otherwise be inadmissible in a court of law. The strict rules of evidence will not apply to determine the admissibility of evidence.

Nothing is admissible in evidence that would be inadmissible in a court by reason of any privilege under the law of evidence.

Witnesses may be called more than once in the discretion of the Commissioner.

Counsel shall produce originals of relevant documents to Commission counsel upon request.

Attendance of Witnesses

Where the Commission requires the attendance of any witness either on its own motion or as a result of any application, a notice to witness may be sent to the witness.

Witnesses may request that the Commission hear their evidence pursuant to a summons in which event a summons shall be issued to them.

The Commission may require any person by summons:

(a) to give evidence on oath or affirmation at the inquiry; or
(b) to produce in evidence at the inquiry such documents and things as the Commission may specify relevant to the subject matter of the inquiry and not inadmissible in evidence at the inquiry under Section 11 of the *Public Inquiries Act*.

Submissions by Counsel

When all the evidence has been adduced at the inquiry, Commission counsel and other parties shall have the right to address the Commission as the Commissioner directs. The Commissioner may direct that written submissions be made by counsel in addition to their oral submissions.

Access to Evidence in the Hearing

All evidence shall be classified as public or private. Evidence from the hearings in camera will be classified and marked "C".

One copy of the transcript of the evidence, when available, and a list of the exhibits of the public hearings, will be available for the use of counsel for the parties at 180 Dundas Street West, Room 2206. A disk version of the transcript or an additional copy may be ordered by any one prepared to pay its costs.

Amendments

These rules may be amended from time to time by the Commission.



COPY

Commission on proceedings
involving Guy Paul Morin

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The Hon. Fred Kaufman, Q.C.
Commissioner

Distribution List - November 21, 1996

Fred Kaufman
Austin Cooper
Mary Anne Sanderson
Mark Sandler
Jane Mills
Roland d'Abadie
Betty Anne Brooker
Phil Downes ✓
Michelle Rumble
Debra Bilous

November 21, 1996.

TO: ALL COUNSEL WITH STANDING

FROM: MARY ANNE SANDERSON and MARK J. SANDLER
Associate Commission Counsel

Documents and Other Matters

This is an update on access to and availability of transcripts and other documents through the Commission offices, together with some information pertaining to our next public hearing.

Documents

A. COMMISSION REFERENCE LIBRARY:

Contents: Since October 31, the library has been available for use by Counsel for the parties with standing, the media and other members of the public. Copies of the *Listing of Transcripts and Documentary Evidence Available in the Commission Reference Library* may be picked up in the library. Please note that the index is updated as documentation comes to our attention. The most current version is dated November 21, 1996.

Access: Library hours are Monday to Friday from 9:30 a.m. to 4:30 p.m. For security reasons, it is important that counsel make appointments to view documentation in the library. In that regard, please call our receptionist, Simone Dholah at (416) 314-4357.

Assistance by Commission Researchers:

We hope that our organization of the library and our detailed *Listing of Transcripts and Documentary Evidence* will allow counsel to locate materials with ease. If more assistance is required, one of our Researchers will be pleased to help when available.

Phil Downes	(416) 325-4214
Jana Mills	(416) 325-6257
Michelle Rumble	(416) 314-4357 (after December 16, 1996)

Photocopy Facilities:

We are of the view that it would be impossible to maintain the integrity of our library and allow documentation to be removed from the premises. After careful consideration, we have developed some alternatives relating to counsel's photocopy requests which we believe will adequately meet the needs of counsel yet not take our Commission staff away from their own work.

If you require photocopies of library documentation, we are currently negotiating with an offsite photocopy firm to provide counsel with two options:

1. Availability of a specially designated photocopy machine for Counsel's use on request. Our staff would monitor the number of copies made and a billing would be forwarded to counsel at month end.

2. The photocopy firm's representative would attend at our offices every day at 4:30 p.m. On receipt of counsel's detailed request form, the photocopying would be done for counsel and counsel would arrange for pick up of the material by 9:30 a.m. on the following day. While the photocopy costs would be charged to the Commission, a billing would be forwarded to counsel at month end.

In the meantime, we will do everything we can to meet counsels' reasonable photocopy requests.

B. WHAT IS CURRENTLY AVAILABLE ON DISKETTE?

Diskettes are available in WordPerfect format as follows:

1. Appellant's Statement of Fact and Law on second appeal to the Court of Appeal. Please note that Volume 1 contains the Appellant's summary of all of the facts. If you are considering obtaining a copy of this document, you may wish to determine if Volume 1 alone will meet your needs.

2. Respondent's Factum on second appeal to the Court of Appeal. Please note that Volumes 1A and 1B contain the Respondent's summary of the facts. Again, if you are considering obtaining a copy of this document, you may wish to determine if Volumes 1A and 1B alone will meet your needs.

3. Crown Summaries of the Second Trial (including stay motion). As with any other attorney work product made available to this Commission and disseminated to counsel, Commission Counsel are not in a position to verify accuracy.

4. We are currently reviewing the availability of diskettes of the cross-examinations on fresh evidence affidavits of:

(a)	Roger Cook	September 28, 1994
(b)	Patricia Newall	October 3/4, 1994
(c)	David H. Bing	October 6, 1994
(d)	Jacob Poranganel	December 20, 1994
(e)	Laura Mair	December 21, 1994
(f)	Orville Kerlew	December 22, 1994
(g)	John Shephard	December 22, 1994
(h)	Bernie Fitzpatrick	December 23, 1994
(i)	Edward Blake	December 23, 1994

and diskettes of other cross-examinations conducted during the course of the fresh evidence motions. Further details will be provided shortly.

Please direct your requests for copies of diskettes of the facta and summaries to Betty-Anne Brooker at (416) 325-1600. A nominal charge of $5.00 per diskette will apply.

C. COMMISSION DATABASES:

The Commission databases are set up in two structures:

Historical Data

The Commission's *Summation for Windows* database includes:

1. motion and trial exhibits (a bibliographic outline only);
2. preliminary hearing transcript;
3. first trial transcripts;
4. second trial transcripts; and
5. fresh evidence cross-examination transcripts.

Access by counsel is under consideration. Counsel will be advised shortly in this regard.

Public Hearings

We have created a database to capture bibliographic details of exhibits entered at and transcripts of public hearings. For your information, three exhibits have been entered to date and, of course, copies are available on request or may be reviewed in the Commission Reference Library. Hard copies of the transcripts of the September 4 and October 31 public hearings are currently available in the Commission Reference Library but will be included in this database. The Public Hearing database will be updated with transcripts on a daily basis once the hearings commence.

D. DOCUMENTS RELATING TO PUBLIC HEARINGS:

You may obtain a copy of the September 4 and October 31, 1996 public hearing transcripts and/or videotapes by contacting our Deputy Administrator, Betty-Anne Brooker at (416) 325-1600. As mentioned earlier, binders of exhibits entered at the public hearings and of transcripts to date are available in the Commission Reference Library. A binder of all written submissions to this Commission to date is also available in the Commission Reference Library.

E. INDEX TO WITNESSES IN TRANSCRIPTS:

In the Commission Reference Library, you will find copies of an Index to Witnesses in Transcripts (preliminary hearing, first and second trials) as prepared by Crown Law - Criminal. This is a handy reference tool which we thought may be of assistance to counsel with standing. Again, Commission Counsel are not in a position to verify the accuracy of this work product.

F. INDEX TO MATERIALS RELATING TO IN-CUSTODY STATEMENTS:

As indicated in the past, the first issue that will be raised before the Commissioner in January at the public hearings will be in-custody statements. For your information, copies of a detailed index to the materials relating to this issue are now available in the Commission Reference Library. Or course, the library contains all of the materials referred to in the index.

Other Matters

G. NEXT PUBLIC HEARING:

The next public hearing is scheduled for November 26, 1996 at 10:00 a.m. to deal only with issues surrounding the Mr. "X" publication ban. Counsel who have no involvement in this issue need not attend. As you are all aware, we are still awaiting information on other issues, including funding and counsel will be kept apprised as matters develop.

If you have any questions or suggestions, please do not hesitate to contact Mark Sandler at (416) 325-4141.

M Sandler
M Sandler

The Commission on Proceedings Involving Guy Paul Morin

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L' hon. Fred Kaufman, c. r.
Commissaire

Ontario

MEMORANDUM TO ALL COUNSEL WITH STANDING

FROM: COMMISSION COUNSEL

December 18, 1996

.....

Documentary access

As you know, the library for counsel has been operational since October 31, 1996. A number of counsel have utilized it. There is now a computer in the library, with a SUMMATION for WINDOWS database corresponding to that which is being made available to counsel on CD-ROM.

A number of counsel have requested and obtained diskettes of material. A number of counsel have also ordered CD-ROMS, which we contemplate will be sent out to those counsel this week.

Most counsel have picked up an index to the material relating to the first phase of the inquiry: In- custody statements. A database report using "May, Mr. X's last name, and Hobbs" as keywords has revealed some additional references that are relevant to that phase. Copies of that database search are now available for counsel in the library.

On January 8, 1997, commission staff will be available to answer any outstanding questions relating to electronic access.

.....

Rules of Procedure

Copies of the applicable rules of procedure, as modified after the input of all counsel, will be available on January 8, 1997.

Conclusion

We are grateful to all counsel for their submissions in writing. They have been extremely helpful to us. We remind all counsel that these submissions are indexed and are all available in the library. We continue to invite all counsel to raise or discuss any issues of concern with us.

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Ontario

January 23, 1997

Memorandum to all counsel for parties with standing
From: Commission counsel

1. Please find enclosed a list of prospective witnesses and an order of presentation relating to the first phase of the inquiry. Of course, this list and order of presentation is always subject to further refinement, as the evidence unfolds or as logistical considerations may dictate.

2. It is not contemplated that parties granted standing will be served with a summons to attend and give evidence, unless they are unrepresented by counsel or counsel on their behalf so insist. In our view, it would be preferable for everyone that attendances be arranged through counsel, without service of a summons, where possible. If counsel are insistent on the service of a summons on their clients, please so advise. Counsel for listed witnesses are requested to immediately contact Mary Anne Sanderson or Mark Sandler to discuss their clients' attendance and possible pre-hearing interviews.

3. It is our intention that s.5 notices be served upon counsel, rather than the parties themselves. Absent any objection from counsel, we will proceed on that basis. We intend to distribute s.5 notices prior to the commencement of the evidence, in the very least, to parties who have direct involvement in the first phase of the inquiry. We remind counsel that s.5 notices do not dictate relevance at the inquiry. Further, additional or supplementary notices may be sent as the evidence unfolds.

.....

6. A number of counsel have been using the CD-ROMs. To further assist counsel using them, commission staff have prepared a user-friendly guide to the file names contained on the CD-ROM. For example: ABBOK 911.104 is described as ABBOTT, Kelly (Second Trial). Copies of this guide are available for interested counsel.

7. Since the files on the CD-ROMs are in ASCII format, they can be accessed via most word processing software, or can be loaded into SUMMATION FOR WINDOWS. Since

counsel will choose to access these files using differing software programs, the page numbering may differ between counsel. Counsel should therefore remember that these electronic files are provided to facilitate preparation, particularly in familiarizing themselves with, and identifying, relevant evidence. At the public hearings themselves, counsel should refer only to the hard copy volume and page number, to ensure uniformity. Some of the transcripts as they appear on the CD ROM still have the original volume and page numbers retained on them (see the left side of the page). Some have a page number but no volume number. (Counsel may wish to insert the relevant volume numbers as a header in their own electronic copies of the transcripts, utilizing the Index to Witnesses and Transcripts, previously made available.) Finally, some transcripts may have no references to the original page and volume numbers. (These were not relevant when the transcripts were originally scanned by the Metropolitan Toronto Police Force.) Counsel should speak to commission staff about concordance materials which may assist them further.

.....

10. A diskette of each day's proceedings will be provided free of charge to counsel for a party which has an interest in that day's proceedings. Hard copy transcripts will be available in the library or can be purchased by counsel.

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L'hon Fred Kaufman, c. r.
Commissaire

Ontario

February 3, 1997

MEMORANDUM TO ALL COUNSEL

FROM: COMMISSION COUNSEL

1. The Commission has received various requests for photocopying. Through the use of outside photocopying services, we have been able, by and large, to fulfil photocopying requests within a day. Requests for photocopying will continue to be accommodated by Commission staff in accordance with the procedures previously outlined. However, requests for photocopying must be sufficiently specific to enable our clerks to locate the material without any difficulty. For example, counsel should specify which page numbers of which volumes of the transcript or appeal books are requested. Up to now, we have been fulfilling requests such as "photocopy all of the evidence ever given by witnesses A, B and C." This kind of request compels our researchers to search for the documentation requested. We remind counsel that they have already been provided with a number of search tools and indices to assist in the identification of relevant materials, notably:

   A. "Index to Witnesses in Transcripts" which locates each witness' evidence at any proceeding

   B. "Listing of Transcripts and Documentary Evidence Available in Commission Reference Library". This listing is updated on a continuing basis and copies are kept in the library for counsel. It is currently updated as of January 7, 1997

   C. The computer in the library contains a summation documents database which describes and locates all the exhibits at the stay motion or second trial. Two pages from the document database are enclosed so that counsel can familiarize themselves with the formatting. A hard copy of the entire database will also be available in the library.

   D. "Index to Materials Relating to In-Custody Statements"

   E. "Index of Material Relating to Hair and Fibre Evidence"

   F. Volume 1 of the Appellant's Factum and Volumes 1(A) and 1(B) of the Respondent's Factum on the second appeal also assist considerably in locating

specific areas of evidence. A number of counsel have these documents on diskettes and/or on the CD-Roms. Some counsel have also ordered photocopies of these facta.

G. The Applicant's Factum on the application to admit the fresh evidence regarding Robert Dean May is also a useful tool for the first phase of the inquiry. It is only available in hard copy in the library. There is no corresponding Respondent's Factum since the DNA results which exonerated Mr. Morin were obtained before a Respondent's Factum was filed on this issue. Please note that some, but not all, of the fresh evidence which was tendered on this issue is contained on the CD-Roms. The balance is located in hard copy in the library.

H. Many counsel have also obtained transcript summaries of the second trial, which are contained in hard copy, on diskettes and are on the CD-Rom.

2. The Court of Appeal has ruled that the publication ban referable to Mr. X is to remain in effect. At the commencement of the proceedings, the Commission will give directions to counsel and the witnesses referable to the ban.

3. As you know, the Metropolitan Toronto Police Force has taken possession of documentation, some of which may be relevant to this inquiry. The M.T.P.F. has been most cooperative in attempting to facilitate access to relevant documentation, in a way that will not compromise their ongoing investigation, other ongoing investigations, legitimate privacy interests of third parties or the preservation of continuity of original materials in their possession. This week, the Commission has received/ or will receive the following:

A. Copies of the notebooks of Officers Fitzpatrick and Shephard. The notebooks have been edited by the M.T.P.F. to excise references to other investigations.(already received)

B. Copies of all supplementary occurrence reports prepared by the York or Durham Regional Police Forces referable to the Christine Jessop investigation, subject to limited exceptions noted immediately below. These have been reproduced from the M.T.P.F. computer database. Accordingly, the formatting is different than the original reports. However, we have been advised that the contents remain the same, except for spelling corrections. (We see no need for the original reports unless some issue arises during the proceedings which compels their retrieval.) The reports are organized by author for convenient reference. The M.T.P.F. has not turned over a limited number of these reports, the disclosure of which may, in their view, affect ongoing investigations or which may undermine the CRIMESTOPPERS program. Commission counsel are being permitted to review these reports to assess possible relevance to any of the parties

here. (already received)

C. A limited number of original materials, relevant to the first phase of the inquiry. (to be received)

These materials are available to be reviewed by COUNSEL for parties with standing who may be affected by this documentation. However, these materials are not being placed in the library, which is accessible to the public at large. They contain references to many names of persons whose privacy interests may be affected by their disclosure. Accordingly, the Commissioner will make directions regulating the publication or non-publication of these materials when the inquiry commences. However, on an interim basis, counsel may review these documents, upon their undertaking that the identity of persons not previously disclosed publicly (or information which could lead to their identity) not be disclosed to the public, absent further direction from the Commissioner.

4. As must be obvious to all counsel, some of the systemic issues raised in phase one include: When should jailhouse informants be utilized by the authorities? How can their reliability best be assessed? What inducements, if any, should be offered to them? How should the relationship between the authorities and such witnesses, including any offers or inducements given, be documented and/or disclosed? What should the relationship between the authorities and such witnesses be? What kinds of arrangements enhance or detract from these witnesses' reliability? When should their identity be protected? What assistance, if any, should such witnesses be provided, post-testimony? As reflected in the memorandum of January 23, 1997, one proposal put forward has been that phase one end with an informal hearing, wherein counsel and other resource persons will discuss various options which may be considered. To facilitate this informal hearing, a discussion paper could be made available, together with resource materials. (Of course, any discussion papers generated by the Commission would make no assumptions about the underlying facts relating to the Guy Paul Morin investigation or prosecution but simply highlight problems identified in the literature and possible solutions, should those problems exist.) We would be grateful if counsel advised us of their views as to whether such informal sessions should take place and if so, when.

The Commission on Proceedings Involving Guy Paul Morin

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Commissioner

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L'hon. Fred Kaufman, c. r.
Commissaire

Ontario

February 10, 1997

Notes for all counsel

1. Immediately outside the library for counsel are "drop off" boxes designated for each counsel. Counsel should check these boxes daily)or arrange for other counsel to check the boxes on their behalf) for information from the Commission, materials requested or the daily diskettes and/or video tapes of the day's proceedings. The diskettes are formatted for WordPerfect but can be preformatted by you for most other software packages. Please address any queries in this regard to Betty Ann Brooker, our Deputy Administrator.

2. Public hearings normally start at 10:00 a.m. We will generally not sit on Fridays. We will also not be sitting in public session during the weeks of March 10, 17 and during the weeks of May 17 and 26.

3. Generally, the Commission will be using copies of exhibits from the original trials, unless originals are essential and their production does not interfere with the ongoing Metropolitan Toronto Police investigation. Originals which we have sought and received are not kept in the library. Please speak to Phil Downes, our continuity person, in this regard.

4. Generally, all letters from counsel are placed in the library so that all counsel are in a position to know what has been submitted to us by others. However, since s.5 notices are confidential, correspondence relating to s.5 notices should be directed to Mary Anne Sanderson and clearly designated as such.

5. Counsel should sign in each day in the counsel sheet. A binder will be kept on the desk at the entrance to the hearing room.

6. VHS tapes of the day's proceedings will be available the next morning. Requests for these must be made to Betty Anne Brooker by the end of the day's proceedings.

7. If counsel wish to have video tapes shown at the hearing, either an entire tape must be shown or pre-selected and designated excerpts should be shown. If there is more than one excerpt on a tape, there should be a 5 second break between segments.

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L'hon. Fred Kaufman, c. r.
Commissaire

Ontario

April 30, 1997

Memorandum to all counsel
From Commission counsel

As you know, we have developed a disclosure policy respecting supplementary reports from Durham Regional and York Regional Police. Many of these reports contain references to names, addresses, telephone numbers and information which raise serious privacy issues. Accordingly, the reports have been available for inspection by counsel for all parties (for disclosure purposes only and not for public dissemination) but copies have not been generally provided.

Counsel most directly involved in the police investigative phases of the inquiry have expressed the concern that this procedure, while workable for earlier stages, is more problematic now, particularly as phase four approaches and greater use of the reports may be anticipated. In the circumstances, we are prepared to make copies of supplementary reports available to those counsel most directly involved in the police investigative phases on the following undertaking from those counsel:

1. Copies of the reports are received for disclosure purposes only and their contents are not to be disseminated publicly.

2. Further copies will not be made of the reports, unless consent is obtained from commission counsel.

3. The copies provided will be returned at the conclusion of Phase 8 of the inquiry.

4. Where counsel seek to refer to these reports or their contents in examination of witnesses or otherwise at the inquiry, and the reports contain material that potentially raise privacy issues, commission counsel will be given notice in advance so that any privacy issues can be addressed through agreement or through order by the Commissioner.

To alleviate privacy concerns further, we would be grateful if counsel could agree upon some sharing of the copies, to avoid many copies being disseminated.

Please advise us immediately of your thoughts in this regard.

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L'hon. Fred Kaufman, c. r.
Commissaire

Ontario

October 28, 1997

Memorandum to all counsel
From Commission Counsel

As you know, we met on October 28, 1997 to discuss remaining procedural issues. Based upon that discussion, commission counsel will propose to the Commissioner that the following rules apply to Phase 8 of the Inquiry — closing submissions.

Written Submissions

There are to be no page limitations upon written submissions though it would be of great assistance to the Commissioner if submissions were concise and well-organized. Counsel can assume that the Commissioner has reviewed the evidence at the inquiry and is conversant with it.

The Criminal Appeal Rules as to facta are to guide the parties as to style, format, spacing, use of transcript references etc. Of course, the written submissions need not be divided into the Parts outlined in the rules but can simply be headed WRITTEN SUBMISSIONS ON BEHALF OF XXXXXX. Subheadings for subject matters would be of assistance to the Commissioner.

The following parties must provide one copy of any written submissions unbound to the Commission no later than 12:00 noon on January 19, 1997:

Guy Paul, Alphonse and Ida Morin
Janet, Ken and Bob Jessop
York Regional Police Board (and related officers)
Durham Regional Police Board (and related officers)
AIDWYC
Criminal Lawyers' Association
Crown Attorneys' Association
Canadian Bar Association (if applicable)
Law Union (if applicable)

The following parties must provide one copy of any written submissions unbound to the Commission no later than 12:00 noon on January 21, 1997:

Leo McGuigan/Alex Smith
Susan MacLean
John Scott
Centre of Forensic Sciences/Nyznyk/Erickson
Bernie Fitzpatrick
John Shepard
Michael Michalowsky
Robert Dean May
Mr. X
Durham Regional Police Association (and related officers)
York Regional Police Association (and related officers)
Ministry of the Solicitor General and Correctional Services (and related employees)
Ministry of the Attorney General

Any party can file one copy of any written submission unbound by way of reply on or before noon on Friday, January 23, 1997. These submissions should be headed REPLY ON BEHALF OF XXXXXX. These submissions should be confined to additional matters raised by other parties in their facta and should not repeat earlier made submissions. There is no obligation to respond to toher parties by way of written reply.

The Durham Regional Police Association (and related officers) can file any reply by 12:00 noon on January 26, 1997 due to the absence of their counsel during the last part of the previous week.

The deadline for submissions needs to be honored by all parties, without exception, to enable the submissions to be copied, distributed to all parties and reviewed by the Commissioner.

Parties who are not funded by the Commission will be billed for the requisite number of copies for all counsel, the Commissioner and library copies. Parties directly funded by the Commission will not be billed for the copies made.

The Commission staff will prepare the copies and make them available in our offices for pickup as follows:

Janauary 19 facta: available pickup will be by 10:00 a.m. the following day
January 21 facta: available pickup will be by 10:00 a.m. the following day
January 23 reply facta: available pickup will be by 4:30 p.m.the same day
January 26 reply factum: (if necessary): available pickup will be by 2:00 p.m. the same day

Written submissions will be made available to the public and media, if requested.

Commission counsel do not presently intend to file written submissions. We will continue to circulate materials (such as summaries of systemic issues or potential systemic recommendations) to assist counsel and the Commissioner.

Of course, no party is required to file written submissions.

Oral Submissions

Oral submissions will be heard on January 26, 27, 28, 29, 30 and if necessary, February 2, 1998, in the following order (as per the consensus of counsel) and with the following allocations of time:

Guy Paul Morin	3.5 hours
Janet, Ken and Bob Jessop	1.0
Leo McGuigan/Alex Smith	2.0
Susan MacLean	2.0
John Scott	1.0
C.F.S./Nyznyk/Erickson	2.0
Bernie Fitzpatrick	2.0
John Shepard	2.0
Michael Michalowsky	1.0
Robert Dean May	0.5
Mr. X	0.5
Durham Regional Police Assoc. (And related officers)	1.0
Durham Regional Police Board (and related officers)	0.75
York Regional Police Association (and related officers)	1.0
York Regional Police Board (and related officers)	0.75
Canadian bar Association (if required)	0.5

AIDWYC	0.75
Criminal Lawyers' Association	0.75
Crown Attorneys' Association	0.75
Ministry of the Solicitor General and Correctional Services (and related employees)	0.75
Ministry of the Attorney General	1.5

We will ascertain the position of the Law Union as to submissions.

We will not establish a right of reply. The Commissioner can address this issue, if and when it arises.

Generally, the Commissioner will hear submissions from 10:00 - 11:20, 11:40-1:00, 2:30-3:30 and 3:45-4:30 (or shortly thereafter). If everyone takes their maximum time for submissions, the Commissioner will complete the public hearings on February 2, 1998.

Commission counsel do not presently intend to make oral submissions on contested evidence or potential findings of misconduct. Commission counsel may or may not make submissions on systemic recommendations only. Commission counsel are also available to correct the record.

Miscellaneous Matters

Counsel who were present for our October 28, 1997 meeting took no objection to the systemic issues identified by commission counsel. Counsel for Mr. Morin wishes the Commissioner to hear evidence on section 690 of the Criminal Code. The position of commission counsel is that section 690 does not directly arise in the Guy Paul Morin case, since he was exonerated prior to any resort to it. However, the Commissioner may wish to familiarize himself with the statutory regimes which exist in other jurisdictions (appellate and otherwise) to address wrongful convictions and may thereby incidentally hear some evidence referable to section 690 and similar or different provisions in other jurisdictions. Accordingly, we are not prepared to convene a panel devoted to consideration of section 690 of the Criminal Code. Counsel for Mr. Morin disagrees and wishes to address the Commissioner on this issue. The Commissioner will hear submissions on this issue on the afternoon of November 20, 1997 after the witnesses for that day have completed their evidence.

At the conclusion of the systemic phase, we will proceed immediately to the section 5 phase. Counsel for the parties who have received section 5 notices have spoken to commission counsel, on the basis of which 2 days will be allocated for section 5 evidence.

There appears to be disagreement as to the jurisdiction of the Commissioner to entertain

submission which might relate to the role of the trial judge. At the conclusion of phase seven, the Commissioner will hear submissions on this issue, since it may affect the content of written submissions to follow.

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L' hon. Fred Kaufman, c. r.
Commissaire

Ontario

April 11, 1997

The Honourable Charles A. Harnick, Q.C.
Attorney General
720 Bay Street
11th Floor
Toronto, ON
M5G 2K1

Dear Sir:

As you know, by Order-in-Council dated June 26, 1996, I was mandated to "inquire into the conduct of the investigation into the death of Christine Jessop, the conduct of the Centre for Forensic Sciences in relation to the maintenance, security and preservation of forensic evidence, and into the criminal proceedings involving the charge that Guy Paul Morin murdered Christine Jessop." On February 10, 1997, commission counsel presented their opening statements and the evidence commenced. The Order-in-Council directs me to "complete this inquiry and deliver its final report containing its findings, conclusions and recommendations to the Attorney General by June 30, 1997." This letter addresses the termination date of the inquiry. For reasons elaborated upon, it is my request that the termination date of the inquiry be extended to March 31, 1998. This request is consistent with the breadth of the inquiry mandate, fiscal responsibility, and the commencement date of the public hearings. Indeed, it is my view that this request should not be seen as a prolongation of the ongoing process, but rather an acknowledgment of the significant amount of work, requiring the co-operation of many parties, needed before the public hearings could begin.

The Order-in-Council contemplated a one year period commencing in June, 1996. However, the public hearings only commenced seven and a half months later. During that period, the commission offices were established, commission staff, including commission counsel, were retained and facilities were renovated to accommodate the multiple parties with standing and daily participation of television, radio and print media. A decision was made that time expended 'up front' in collecting, assimilating, organizing and computerizing the voluminous documentation in existence would ultimately ensure that the hearings be conducted in an expeditious and efficient manner. Accordingly, two libraries were created; one for the Commission itself, and one for counsel for parties with standing and other interested parties. Each library contains transcripts from the first trial (about 1839 pages), the second trial (about 77,800 pages), fresh evidence materials (about 21,400 pages) and summaries of the documentary evidence (which commission staff prepared), all relating to the Christine Jessop investigation and Guy Paul Morin prosecutions and appeals for the period of approximately 10 years from October, 1984 to January, 1995.

A database was created, accessible to all parties, which contains many of the above materials, together with the transcripts of the public hearings (about 200-250 pages per day). The database has Summation search capacity, enabling, for example, immediate location of all evidence relating to a particular witness. During this 'start up' period, commission counsel familiarized themselves with much of this material, to ensure a focused and informative inquiry. Rules of procedure were established, with the input of all parties with standing. Notices pursuant to s.5 of the *Public Inquiries Act* were served confidentially early in the proceedings to ensure procedural fairness. These will be supplemented as the inquiry progresses.

Phases for the inquiry were established and consideration given to the witnesses to be called at the inquiry. Throughout, commission counsel have been mindful of my mandate to utilize existing documentation, to the extent possible. (At the commencement of the inquiry, commission counsel presented an opening statement, outlining the background facts reflected in the public record. Further, commission counsel will open each phase of the inquiry by presenting an outline of the background facts relating to that phase and the systemic issues arising therefrom. Much of the groundwork for these openings was done in the start up period.)

This start up period was also prolonged for reasons not anticipated by anyone when the original O.I.C. was approved. The Crown Law Office and the Court of Appeal were requested by the Commission to collect, organize and deliver much of the documentation now contained in our libraries. This, understandably, took several months. Commission Counsel and the Metropolitan Toronto Police agreed that a protocol had to be established

before sensitive (and voluminous) materials in the possession of the police could be released. This ensured that appropriate safeguards to protect legitimate privacy issues were in place, and that any ongoing police investigation would not be compromised, while ensuring that parties with standing would have the full ability to address relevant issues at the inquiry. This very necessary protocol had to be in place prior to obtaining these materials which were of great importance to us and to parties with standing. Finally, a variety of issues, such as standing, funding and publication bans had to be addressed before the public hearings on the substantive issues could commence.

The public hearings have been divided into eight phases.

1. **In-custody statements**. Subject to two witnesses, previously unavailable, this phase has been completed. Most of the witnesses who gave evidence did not testify at the first or second Morin trials. Some testified on a fresh evidence application relevant to Mr. Morin's appeal against conviction. In the opening statement, commission counsel outlined the important systemic issues which might arise out of this phase. These have been provided to your Ministry (and all parties with standing).

2. **Forensic evidence and the role of the Centre for Forensic Sciences.** This phase primarily relates to hair and fibre evidence and pathology. The Order-in Council specifically addresses the Centre as part of my mandate. This phase commenced on April 2, 1997. Assuming the timetable proposed herein, commission counsel expect this phase to be completed by May 8, 1997. In the opening statement, commission counsel outlined the important systemic issues which might arise out of this phase. Again, these issues have been provided to your Ministry (and all parties with standing.)

3. **York Region investigation.** This phase relates to the investigation conducted by the York Regional Police Force from the disappearance of Christine Jessop to the discovery of her body and the transfer of the case to Durham Region. Commission counsel expect that the *viva voce* evidence on this phase will be short and will be completed by June 5, 1997. (Due to my previous commitments, the Commission will not be formally sitting during the weeks of May 19 and 26.) Commission counsel are mindful of the recommendations of Mr. Justice Archie Campbell arising out of the Bernardo case and will avoid duplication.

4. **Durham Region investigation.** This phase relates to the investigation conducted by the Durham Regional Police Force and is expected to embrace many factual and systemic issues of importance. Commission counsel expect that this phase will be

completed by the end of the summer.

5. **The Trial.** This phase examines the trial itself. One issue which arises here is disclosure. Commission counsel are mindful of the Martin Committee Report and the decision of the Supreme Court of Canada in *Stinchcombe* and will avoid duplication. Commission counsel expect that this phase will be completed by September 30, 1997.

6. **Systemic Evidence.** I expect that experts will provide me, *inter alia,* with assistance as to the causes of wrongful convictions generally, and the practices and procedures which exist in this and other jurisdictions that are, and should be, utilized, to prevent miscarriages of justice. It has been suggested that informal sessions or panel discussions or forums may be employed to assist me in making systemic recommendations. Commission counsel expect that this phase will be completed by November 6, 1997.

7. **Section 5 Phase.** As you know, persons or organizations who have received notices under s.5 of the *Public Inquiries Act* may wish to call evidence relating to potential findings of misconduct. Commission counsel expect that this phase will be completed by December 18, 1997. (A personal commitment prevents me from sitting in public hearings for two weeks in November.) The Act requires that parties be provided the opportunity to call such evidence, if relevant and not redundant, to resist potential findings of misconduct. Of course, it is difficult to predict which witnesses, if any, will be called at this phase. However, commission counsel have encouraged parties with standing to advise them of desired witnesses during the phases and commission counsel have called (or intend to call) several such witnesses at the request of other parties as a result. Further, parties with standing are being called as witnesses during the phases themselves, with a full opportunity for their counsel to elicit evidence upon which they rely. Accordingly, it is hoped that much of the evidence, which would otherwise be relevant here, will be called at earlier phases.

8. **Submissions and Report.** Given the breadth and importance of the factual and systemic issues which arise, it will take three months for me to write my final report after the completion of evidence. Subject to input from counsel, I intend to request written submissions from all counsel, followed in mid-January by oral submissions with well-defined time limits.

Public hearings take place Monday to Thursday, from 10:00 a.m. sharp to 4:30 p.m. Often hearings have extended to 5:00 p.m. and, on occasion, longer, to enable witnesses to complete their evidence or to accommodate counsel. We have sat on Fridays or started earlier

in the day to accommodate witnesses or counsel as well. Indeed, commission counsel, who have a working timetable, have sought modification of our normal sitting hours on occasion to ensure that a schedule is maintained.

The start up period, earlier referred to, has paid the desired dividends. We proceeded from phase one to phase two after a ten minute adjournment. Counsel for all parties receive the record of daily hearings by way of diskettes, hard copies or CDs (at their option). Transcripts are prepared in-house to substantially reduce cost and ensure timely delivery. Costs are recovered for the distribution of these materials. Photocopying requests have been processed by commission staff on a timely basis. Indeed, commission counsel instituted a 24 hour turnaround policy for such requests. A system is in place to provide disclosure to counsel of ongoing interviews of prospective witnesses and newly discovered documentation. Rules have been developed to facilitate reciprocal disclosure by parties with standing. Privilege and privacy issues have been addressed and categories of documentary access established. Commission counsel speak with other counsel daily to facilitate a full and fair inquiry.

I say with some pride that counsel for parties with standing and the many media representatives have repeatedly commended commission counsel in the conduct of the inquiry. I have been impressed with the skill and hard work exhibited by counsel for parties with standing. Though the issues often generate a certain "heat", counsel have demonstrated great courtesy to me and to their fellow counsel. I should add that we have also received informational requests from counsel involved in another inquiry, who have been advised of the successful approach we have taken to these matters.

The timetable proposed above is a demanding, but realistic one. In my view, it brings with it some flexibility. For example, where a hearing date is cancelled due to illness, or a witness is not completed on schedule, a Friday can and will be allocated to stay on schedule. As I have previously indicated, this does not reflect some unrealized expectation but the Commission's current practice. It is unfeasible to sit, as a matter of course, on Fridays, since these days are used by commission counsel to interview prospective witnesses, make disclosure, and by all counsel to obtain relevant materials, prepare for the following week and arrange other matters. Frankly, I would anticipate that regular Friday sittings would ultimately be counterproductive.

As you know, I have taken steps to ensure that this inquiry is efficient, but fair. Parties have been granted limited standing, appropriate to their situation. The phases lend themselves to limited standing. Several counsel who appeared at the early stages of phase one no longer attend the hearings. Some counsel monitor the inquiry's progress almost exclusively through the diskettes, hard copies or CDs provided to them. Organizations have been granted

standing on systemic issues. Their ability to cross-examine has been limited to systemic issues. Any concerns about the prolongation of the hearings due to their involvement have proven groundless. These organizations have performed a valuable role at this inquiry. They have been encouraged to raise potential issues with commission counsel who have addressed those issues in their own questions. Cross-examinations by counsel for such organizations have been brief, helpful and selective. The completion of the first phase in a timely manner, and the immediate commencement of phase two, further reflects the inquiry's efficiency and the co-operation of counsel.

The inquiry addresses issues of fundamental importance to the administration of justice. These issues involve a factual determination as to how an innocent person was convicted of a crime that he did not commit, systemic recommendations for changes in the justice system to prevent such miscarriages of justice in the future, and a public presentation of the inquiry into those issues so as to perform a public educational function. Each of the phases is designed to ensure that those important issues and that presentation can be dealt with. The proposed timetable is necessary to enable those phases to be addressed.

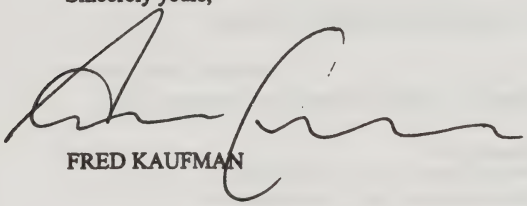
One cannot be oblivious to the fact that criticism has been directed to some public inquiries, rightly or wrongly, for repeated extension requests, and undefined or uncontrolled hearings. A recent article in the Globe and Mail reflected such criticism. I could not help but note that our commission was listed as a notable exception.

As I earlier indicated, the public hearings began in February of this year (and will have lasted less than six months by June 30, 1997). This request is, therefore, as indicated above, more reflective of the considerable amount of time spent 'up front' gathering and consolidating materials, and designing the process so that the hearings, upon commencement, would proceed expeditiously and fairly. This latter goal appears to have been achieved to date. However, I am mindful of the concerns which any extension request raises and the importance that the public support the work of this Commission. (In my view, the public and the media have been supportive of this Commission.) Accordingly, should the proposed timetable be acceptable to the government, I will not apply for a further extension. Instead, my counsel and I will use the flexibility earlier noted to ensure the timely completion of the inquiry. Of course, such a commitment need also recognize that circumstances truly beyond our control (such as illness or applications to the courts which delay the Inquiry) cannot be foreclosed.

The Government's prompt attention to this matter would be greatly appreciated since commission counsel do not intend to set schedules or sitting dates beyond June 30, 1997, absent a determination of this issue.

Thank you for your consideration of this matter.

Sincerely yours,



FRED KAUFMAN

c.c Larry Taman, Deputy Attorney General

IN THE MATTER OF the Commission on Proceedings Involving Guy Paul Morin, pursuant to Order in Council 1209/96;

The Honourable Fred Kaufman, Q.C., Commissioner

RULING ON MR. DANSON'S MOTION TO STATE A CASE

I have before me a motion made by counsel for the Jessop family " to state a case pursuant to section 6 of the *Public Inquiries Act* "(R.S.O. 1990, Chapter P. 41).

This section reads, in part, as follows:

> 6. - (1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.

As can be seen, a request to state a case can be made only by "a person affected" and I must, therefore, determine at the outset whether or not the Jessops can be so classified. The answer, I think, must be that they are, and I refer to my Ruling on Standing (September 25, 1996) where I described their interest not only as "substantial and direct", but also as "clear and unequivocal", and nothing further has to be said on this point.

Some background to this motion is in order.

On August 14, 1997, in response to a request made by counsel for the Jessop family that I give instructions to my counsel to summon the jurors from both trials to give evidence before this Commission, I dismissed the application, and I attach a transcript of my ruling as Appendix "A".

My reasons were four-fold:

1. The prohibition contained in section 649 of the *Criminal Code* and the practical impossibility of asking meaningful questions and of getting meaningful answers without violating the section;

2. The fact that even if some jurors were inclined to testify, voluntarily or otherwise, others might not, and the result would, therefore, be skewed;

3. Limitations of time consistent with my mandate, which terminates on March 31, 1998;

4. My disinclination, regardless of the above, to require jurors to testify.

Subsequent to my ruling, counsel for the Jessop family gave notice that he would ask the Ontario Court of Justice (General Division) to rule on "the constitutional validity of section 649 of the *Criminal Code of Canada* and the corresponding common law rule". A pre-hearing conference was held before McPherson J., and I understand that Mr. Danson subsequently decided that a stated case might be a more efficient remedy because the Divisional Court, unlike the General Division, would have the power to look beyond the pure constitutional question and decide ancillary questions as well. Mr. Danson thereupon so moved before me, but he did so without abandoning his original notice which, I was told, remains before the Court.

That then, is the background to the present application, which was presented by counsel for the Jessop family, with support from Mr. Morin's counsel. Commission counsel also urged me to accede to Mr. Danson's request — though "not quite in the form suggested by Mr. Danson". However, at the same time, Mr. Cooper argued strongly that "it would be unseemly and improper to force the jurors who sat at the Morin trials to come to this Commission to be examined under oath as to their opinions and their deliberations during the Morin trial ... regardless of whether section 649 of the *Criminal Code* is constitutional or unconstitutional".

And he added:

> I am concerned that questioning those jurors at this Commission may give the Commission the atmosphere of a circus. Our common law tradition has always opposed the calling of jurors to explain their verdicts, and I suggest that's one of the reasons it's part of our culture, and part of the dispassionate way that Canadian tribunals have always administered justice.

As is the custom (see, for instance, *R. v. Canadian Breweries Transport* (1956), 117 C.C.C. 37), I was presented with a draft of the questions to be stated, together with certain modifications suggested by Commission counsel, and the two drafts are attached as Appendices "B" and "C". However, in light of my conclusion it is unnecessary to examine the draft and the proposed modifications. My difficulty was not with the questions, but rather with the more basic issue of whether I should state a case at all.

In my opinion I should not, and my reasons are set out below.

As indicated in my ruling on August 15, 1997, I have no doubt that the jurors' views might be enlightening and, as I said then, "their collective experience might make a fascinating chapter in the annals of criminal law". But that does not alter the fact that *even without the presence of section 649* (should it be declared unconstitutional) there are good reasons why I should not hear their testimony.

To begin with, section 649 was in place for both trials and both judges warned the jurors accordingly:

The Honourable Mr. Justice Craig:

> I want to warn you too at this time that it is a criminal offence to disclose any information relating to proceedings in your jury room. This does not mean that you cannot come and discuss with me any problems that you may have; that is quite proper, but apart from that, all discussions in your jury room and any information as to how you may have voted must never be disclosed by you.
>
> I would like to explain to you the reason for that.
>
> At the conclusion of my charge you will retire to consider your verdict and no doubt at that time the evidence will be discussed fully by all of you. A juror must be able to advance his or her views at that time without any fear that those views would be made public or repeated outside of the jury room after you return your verdict. So the law against disclosing information relating to proceedings in your jury room is designed to permit and encourage a full and frank discussion in the jury room and that is without any possibility that those views expressed by any of you will be made public.

And later:

> I want to remind you again, before discharging you, that everything that was said in your deliberations in the jury room must be kept secret. No one has the right to know what was said in the jury room or how you arrived at your verdict. This must be kept to yourselves, your deliberations and your vote. If

> you disclose them, *as I advised you at the beginning of the trial,* that constitutes a criminal offence.

The Honourable Mr. Justice Donnelly:

> Before discharging you, I *remind* you that your deliberations in the jury room are not to be disclosed in any form to any person. They are absolutely confidential and I repeat my thanks.

This makes it clear that each juror was told *even before the deliberations began,* that what will be said in the jury room cannot be disclosed thereafter, and for that reason alone I feel that any attempt to elicit these jurors' views and beliefs would be inappropriate. With these judicial admonitions, so firmly and unequivocally stated, it would be unseemly for me to summon the jurors to appear before this Commission under the pain of contempt. I realize, as Mr. Danson pointed out, that questions could be asked which would attempt to limit the response to generalities, but even if that were successful, would the right to cross-examine not be inhibited? And what if a juror, however inadvertently, were to make reference to what was said by a colleague? The list of difficulties goes on.

Furthermore, as I said in my previous ruling, while some of the jurors might be willing to testify (as some had indicated to the media), others might not, and evidence so obtained would necessarily be skewed and of diminished value.

I might add that I am fortified in this view by the recent pronouncement of Finlayson J.A. in

6

R. v. Selles (1997), 116 C.C.C. (3d) 435 at 452:

> I would add that a jury's verdict has always been considered sacrosanct. A jury is protected from having to explain how its members voted and for what reason. The anonymity of the jury verdict safeguards the individual juror from personal scrutiny and accountability. Absent allegations of impropriety, a public investigation into the adjudicative process behind the collective verdict could well have an inhibiting effect on individual jurors who would otherwise be prepared to take unpopular positions with respect to the case before them.

In the result, for the reasons cited above, as well as those submitted by Commission counsel, I hold the firm view and conviction that, even if the constitutional challenge were to succeed (a question on which I express no opinion), it is not necessary for me in order to fulfil my mandate that I summon the jurors, nor indeed would such a course be in the interest of justice.

That being so, the question arises whether or not I should state a case nevertheless.

In her submission, Ms. Sayers (for the Attorney General), said this in part:

> Even if the stated case is the appropriate one, you're still left with the question whether you should exercise your discretion to state a case on this issue. A highly relevant consideration in deciding whether or not to state a case on this question is whether it is necessary to have a judicial ruling on point for purposes of the proper conduct at this Inquiry. And in [my] respectful submission, it is not.

With respect, I agree with Ms. Sayers. The constitutionality of section 649 of the *Criminal Code* is a central feature of the proposed stated case (whether as submitted by Mr. Danson or as modified

by Mr. Cooper). However, as I said earlier, it is my view that jurors ought not to be summoned, whether or not section 649 can withstand *Charter* scrutiny. In my opinion, it would not be an appropriate exercise of my discretion to state the proposed case in these circumstances. Accordingly, I respectfully decline to do so.

I am indebted to all counsel who spoke to the matter for their assistance.

September 24, 1997.

Counsel for the applicants:	Mr. Timothy S. B. Danson
Counsel for the Morin family:	Ms. Joanne McLean
Counsel for the Attorney General of Ontario:	Ms. Fran Sayers
Counsel for Leo McGuigan and Alex Smith:	Mr. Earl J. Levy, Q.C.
Commission Counsel:	Mr. Austin Cooper, Q.C., Mr. Mark Sandler and Ms. Maureen Currie

File 704/97

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

O'DRISCOLL, STEELE AND SOMERS JJ.

IN THE MATTER OF The Commission on Proceedings Involving Guy Paul Morin, pursuant to Order in Council 1209/96	*T.S.B. Danson* for the Jessops
AND IN THE MATTER OF the decision of The Honourable Fred Kaufman, Q.C., Commissioner, dated September 23, 1997, declining the applicants' request pursuant to section 6(1) of the *Public Inquiries Act*, R.S.O. 1990, Chapter P.41, to state a case to the Divisional Court	*Leslie M. McIntosh and David Lepofsky* for the A.G. (Ontario)
	J. McLean for Guy Paul Morin
AND IN THE MATTER OF an application by Bob, Janet and Kenneth Jessop pursuant to section 6(2) of the *Public Inquiries Act*, R.S.O. 1990, Chapter P.41, for an order directing the Commission to state a case to the Divisional Court.	*M.J. Sandler and M.B. Currie* for the Commissioner
	Heard at Toronto: October 10, 1997

O'DRISCOLL J.:

I. Nature of the Proceedings

Counsel for the Applicants/Jessops, supported by counsel for Guy Paul Morin, applies under s. 6(2) of the *Public Inquiries Act*, R.S.O. 1990, c. P.41, for an order directing the Commissioner, the Honourable Fred Kaufman, Q.C. to state a case.

Public Inquiries Act, supra,

> s. 6(1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.
>
> (2) If the commission refuses to state a case under subsection (1), the person requesting it may apply to the Divisional Court for an order directing the commission to state such a case.
>
> (3) Where a case is stated under this section, the Divisional Court shall hear and determine in a summary manner the question raised.

Before us, counsel for the Applicants/Jessops stated: "We want to call before the Commissioner the twenty-four (24) jurors as witnesses".

The application fails.

II. Background and Chronology

1. On October 26, 1996, by Order in Council 1209/96, the Lieutenant Governor of the Province of Ontario in Council appointed the Honourable Fred Kaufman, Q.C. (the Commissioner) to inquire, *inter alia*, "into the criminal proceedings involving the charge that Guy Paul Morin murdered Christine Jessop". By Order in Council 839/97, dated April 23, 1997, the completion date for the Commission's final report was extended from June 30, 1997 to March 31, 1998.

2. On August 13, 1997, on behalf of the Jessops, Mr. Danson presented a motion

to the Commissioner for an order that all jurors (24) from both trials of Guy Paul Morin be summoned to give evidence before the Commission.

3. On August 14, 1997, in oral reasons, the Commissioner dismissed the motion to summon the jurors.

Section 649 of the *Criminal Code* states:

> 649. Every member of a jury who, except for the purposes of
>
> (a) an investigation of an alleged offence under subsection 139(2) in relation to a juror, or
>
> (b) giving evidence in criminal proceedings in relation to such an offence, discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction.

In his oral reasons, the Commissioner pointed out that if the jurors were called it would be almost an impossible task to monitor their evidence in view of s. 649 of the *Criminal Code*. He also said:

> But while the terms of this Commission permit me to examine all aspects of Mr. Morin's wrongful conviction and to make such recommendations as I may see fit to improve the administration of criminal justice in this province -- and, I might say, to do so by March 31, 1998 -- I must put limits on the process consistent with my mandate and fairness to all parties.
> ...
> But to ask them to appear before this Commission, even voluntarily, raises both legal and practical hurdles which cannot be overcome.

Counsel for the Applicants pointed out that at page 3 of the August 14, 1997 ruling, the Commissioner said: "It is not my intention, nor do I have the power, to rule on the

constitutionality of s. 649".

4. On September 17, 1997, counsel for the Applicants presented a motion to the Commissioner for:

> (i) The Commissioner to state a case pursuant to section 6 of the *Public Inquiries Act*.
>
> The grounds for the motion are:
>
> 1. On August 14, 1997, The Honourable Fred Kaufman, Q.C., dismissed the applicants' motion to call members of the jury presiding at both murder trials of Guy Paul Morin.
>
> 2. The applicants feel that the jurors ought to be called as witnesses and therefore, the reasons provided by the Commissioner ought to be reviewed in accordance with section 6 of the *Public Inquiries Act*.

Counsel for the Commission urged the Commissioner to accede to Mr. Danson's request although "not quite in the form suggested by Mr. Danson".

After hearing submissions from all interested parties, the Commissioner reserved judgment.

5. On September 24, 1997, the Commissioner released seven (7) pages of written reasons declining the request to state a case to the Divisional Court.

In his reasons, the Commissioner pointed out that during the trial of R. v. Guy Paul Morin, (No. 1), Craig J. had said to the jury:

> I want to warn you too at this time that it is a criminal offence to disclose any information relating to proceedings in your jury room. . . .

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> At the conclusion of my charge you will retire to consider your verdict and no doubt at that time the evidence will be discussed fully by all of you. A juror must be able to advance his or her views at that time without any fear that those views would be made public or repeated outside of the jury room after you return your verdict. . . .
>
> I want to remind you again, before discharging you, that everything that was said in your deliberations in the jury room must be kept secret. No one has the right to know what was said in the jury room or how you arrived at your verdict. This must be kept to yourselves, your deliberations and your vote. If you disclose them, *as I advised you at the beginning of the trial,* that constitutes a criminal offence.

In *R. v. Guy Paul Morin, (No. 2)*, Donnelly J. said to the jury:

> Before discharging you, I *remind* you that your deliberations in the jury room are not to be disclosed in any form to any person. They are absolutely confidential and I repeat my thanks.

The Commissioner's reasons then concluded:

> This makes it clear that each juror was told *even before the deliberations began*, that what will be said in the jury room cannot be disclosed thereafter, and for that reason alone I feel that any attempt to elicit these jurors' views and beliefs would be inappropriate. With these judicial admonitions, so firmly and unequivocally stated, it would be unseemly for me to summon the jurors to appear before this Commission under the pain of contempt. I realize, as Mr. Danson pointed out, that questions could be asked which would attempt to limit the response to generalities, but even if that were successful, would the right to cross-examine not be inhibited? And what if a juror, however inadvertently, were to make reference to what was said by a colleague? The list of difficulties goes on.
>
> Furthermore, as I said in my previous ruling, while some of the jurors might be willing to testify (as some had indicated to the media), others might not, and evidence so obtained would necessarily be skewed and of diminished value.

I might add that I am fortified in this view by the recent pronouncement of Finlayson J.A. in *R. v. Selles* (1997), 116 C.C.C. (3d) 435 at 452:

> I would add that a jury's verdict has always been considered sacrosanct. A jury is protected from having to explain how its members voted and for what reason. The anonymity of the jury verdict safeguards the individual juror from personal scrutiny and accountability. Absent allegations of impropriety, a public investigation into the adjudicative process behind the collective verdict could well have an inhibiting effect on individual jurors who would otherwise be prepared to take unpopular positions with respect to the case before them.

In the result, for the reasons cited above, as well as those submitted by Commission counsel, I hold the firm view and conviction that, even if the constitutional challenge were to succeed (a question on which I express no opinion), it is not necessary for me in order to fulfil my mandate that I summon the jurors, nor indeed would such a course be in the interest of justice.

That being so, the question arises whether or not I should state a case nevertheless.

In her submission, Ms. Sayers (for the Attorney General), said this in part:

> Even if the stated case is the appropriate one, you're still left with the question whether you should exercise your discretion to state a case on this issue. A highly relevant consideration in deciding whether or not to state a case on this question is whether it is necessary to have a judicial ruling on point for purposes of the proper conduct at this Inquiry. And in [my] respectful submission, it is not.

With respect, I agree with Ms. Sayers. The constitutionality of section 649 of the *Criminal Code* is a central feature of the proposed stated case (whether as submitted by Mr. Danson or as modified by Mr. Cooper). However, as I said earlier, it is my view that jurors ought not to be summoned, whether or not section 649 can withstand *Charter* scrutiny. In my opinion, it would not be an appropriate exercise of my discretion to state the proposed case in these circumstances. Accordingly, I

respectfully decline to do so.

6. Under the heading of "Mandate", Order in Council 1209/96 states:

> 5. To the extent that the Commission considers advisable, it may rely on any transcript or record of pre-trial, trial or appeal proceedings before any court in relation to the proceedings and prosecution and on such other related material as the Commission considers relevant to its duties.

Part of the material before the Commission includes a transcript of the trial of *R. v. Guy Paul Morin, (No. 1)* and a transcript of the trial of *R. v. Guy Paul Morin, (No. 2)*.

7. No one alleges any misconduct or impropriety on the part of any one of the twenty-four (24) jurors who tried Guy Paul Morin.

Indeed, the Inquiry has nothing to do with what the jury accepted or rejected.

8. Before us, counsel for the Commissioner no longer supported the application of the Applicants/Jessops but supported the ruling of the Commissioner and the position taken by the Respondent, the Attorney General (Ont.).

9. Before us, counsel for the Applicants announced that "this constitutional challenge of section 649 of the *Criminal Code* cannot be stopped; if the Divisional Court does not grant an order under s. 6(2) of the *Public Inquiries Act*, the Applicants/Jessops will apply to the Ontario Court of Justice (General Division) pursuant to the draft notice of application found at Tab 7 of the Motion Record".

In answer to that submission, I have two comments:

1. so be it, and

2. in terrorem arguments are not persuasive.

III. What tests must the Applicants meet to obtain the order requested under s. 6(2) of the Public Inquiries Act?

1. The provisions of the statute:

(a) Section 3 of the *Public Inquiries Act*:

> Subject to sections 4 and 5, the conduct of and the procedure to be followed on an inquiry is under the control and direction of the commission conducting the inquiry.

(b) Section 4 of the *Act* states that, subject to certain exceptions, all hearings are open to the public.

(c) Section 5(1) of the *Act*:

> A commission shall accord to any person who satisfies it that the person has a substantial and direct interest in the subject-matter of its inquiry an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by counsel on evidence relevant to the person's interest.

2. The jurisdiction conferred on the Divisional Court under s. 6(1) of the Act [1971 (Ont.) C. 49, now R.S.O. 1990, c. P.41] is much narrower than the jurisdiction conferred under s. 5(1) of the *Public Inquiries Act*, R.S.O. 1970, c. 379. Section 5(1) of the 1970 statute conferred both an appellate and a supervisory jurisdiction upon the Divisional Court. In *Re Bortolotti et al. and Ministry of Housing et al.* (1977), 15 O.R. (2d) 617, (Ont. C.A.) - (Estey C.J.O., Houlden and Howland JJ.A.), for the Court, Howland J.A. wrote: p. 623-4:

> Section 5(1) conferred both an appellate and a supervisory jurisdiction upon the Court. It permitted the Court to review decisions, orders or directions made in the exercise

of the Commissioner's discretion and to substitute its opinion for that of the Commissioner when the validity of his decision, order or direction was called into question: *Re Ontario Crime Com'n, Ex p. Feeley and McDermott*, [1962] O.R. 872 at p. 895, 34 D.L.R. (2d) 451 at p. 474, 133 C.C.C. 116.

Section 6(1) of the *Public Inquiries Act, 1971* no longer provides for a case to be stated as to the "validity of any decision, order, direction or other act of a commissioner". I am in agreement with the conclusion of Morden, J., in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* (1975), 10 O.R. (2d) 113 at pp. 119-21, 64 D.L.R. (3d) 477 at pp. 483-5, 27 C.C.C. (2d) 31, that "authority" in s. 6(1) means "jurisdiction", and that the statutory powers of the Court are now "supervisory only, *i.e.*, confined to seeing to it that the Commission does not exceed its jurisdiction. They do not extend to enable the Court to substitute its discretion for that of the Commission where the latter has made a decision lying within the confines of its jurisdiction".

An error of jurisdiction arises where the Commission has not kept within the subject-matter of the inquiry as set forth in Order in Council 2959/76. In the exercise of its powers under s. 6(1) of the *Public Inquiries Act, 1971*, the Divisional Court has a supervisory role to perform respecting errors of jurisdiction. In considering whether the Commission has exceeded or has declined its jurisdiction, it is necessary to determine what evidence is admissible before the Commission and whether the Commission has the power to reject evidence by the application of exclusionary rules of evidence.

The Commission of Inquiry is charged with the duty to consider, recommend and report. It has a very different function to perform from that of a Court of law, or an administrative tribunal, or an arbitrator, all of which deal with rights between parties: *Re Ontario Crime Com'n*, [1963] 1 O.R. 391, 37 D.L.R. (2d) 382, [1963] 1 C.C.C. 117. It is quite clear that a commission appointed under the *Public Inquiries Act, 1971* is not bound by the rules of evidence as applied traditionally in the Courts, with the exception of the exclusionary rule as to privilege (s. 11): *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* at p. 124 O.R., p. 488 D.L.R.; *Re Children's Aid Society of County of*

York, [1934] O.W.N. 418 at p. 420. It may admit evidence which is not given under oath or affirmation (s.10).

The approach of the Commission should not be a technical or unduly legalistic one. A full and fair inquiry in the public interest is what is sought in order to elicit all relevant information pertaining to the subject-matter of the inquiry.

As Cross points out in his text on *Evidence*, 4th ed., at p. 24:

> The admissibility of evidence...depends first on the concept of relevancy of a sufficiently high degree, and secondly on the fact that the evidence tendered does not infringe any of the exclusionary rules that may be applicable to it.

In my opinion, any evidence should be admissible before the Commission which is reasonably relevant to the subject-matter of the inquiry, and the only exclusionary rule which should be applicable is that respecting privilege as required by s. 11 of the *Public Inquiries Act, 1971*. The requirement that the evidence be reasonably relevant was applied by this Court in *R. v. Gaich or Gajic*, [1956] O.W.N. 616, 116 C.C.C. 34, 24 C.R. 196. Having determined that the test of reasonable relevance should be applied, it is necessary to consider the meaning of the words "reasonably relevant".

The definition of "relevant" which has been commonly cited with approval by the Courts is that in *Stephen's Digest of the Law of Evidence*, 12th ed., art. I. It states that the word means that "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other". In concluding what evidence is admissible as being reasonably relevant to a commission of inquiry, I would adopt the statement in *McCormick on Evidence*, 2nd ed., at p. 438: "Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value...".

. . .

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p. 625-6:

In deciding whether evidence is reasonably relevant it is necessary to scrutinize carefully the subject-matter of the inquiry as set forth in Order in Council 2959/76. This is the governing document. The subject-matter of the inquiry is broad and somewhat unusual in its nature.

The foregoing test of relevancy means that the gates will be opened quite wide in the admission of evidence. All the evidence admitted will not, of course, be of equal probative value. It will be the task of the Commission to determine the weight which should be given the oral or documentary evidence presented to it, when making its recommendations and report.

If evidence is reasonably relevant to the subject-matter of the inquiry, the Commission is not entitled to reject it as offending one of the exclusionary rules of evidence as applied in the Courts, other than the rule as to privilege which is made expressly applicable by s. 11 of the *Public Inquiries Act, 1971*. If this were not so, it would be possible, as Morden, J., points out in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton, supra,* at p. 121 O.R., p. 485 D.L.R., for the Commission to "define its own terms of reference under the guise of evidential rulings on admissibility" and consequently to govern its jurisdiction. If the Commission has refused to admit evidence which is reasonably relevant to the subject-matter of the inquiry, and is not expressly excluded by the *Public Inquiries Act, 1971*, or has admitted evidence which is not reasonably relevant to the inquiry, then the Commission is subject to the supervisory role of the Divisional Court on a stated case under s. 6(1) on the ground that the Commission has declined or exceeded its substantive jurisdiction.

An error of jurisdiction might also arise by reason of the denial of a statutory right. Under s. 5(1) of the *Public Inquiries Act, 1971* a person who satisfies the Commission that he has a substantial and direct interest in the subject-matter of the inquiry is entitled to give evidence and to call and cross-examine witnesses relevant to his interest. The exclusion of such evidence by the Commission would be a denial of a statutory right amounting to an error of jurisdiction. The admission of evidence which is privileged under the law of

> evidence would fall within the same category by reason of s. 11 of the *Public Inquiries Act, 1971*.
>
> Apart from the supervisory role of the Divisional Court in respect of errors of jurisdiction, the Commission has very broad powers under s. 3 of the *Public Inquiries Act, 1971*, as qualified by ss. 4 and 5, to control and direct the procedure to be followed on the inquiry. The Commission has a wide discretion, which it can exercise within the framework of the jurisdiction of the Commission. However, it cannot, as I have stated, exercise its discretion so as to narrow or enlarge that jurisdiction.

IV. Conclusions

1. Subject to sections 4 and 5 of the *Public Inquiries Act, supra*, pursuant to s. 3 of the Act, the conduct of and the procedures to be followed on an inquiry is under the control and direction of the Commissioner conducting the inquiry.

2. The Commissioner has stated in his reasons that even if s. 649 of the *Criminal Code* were ruled to be in violation of the *Charter of Rights and Freedoms*, he would not call before the Commission any of the twenty-four (24) jurors from trials 1 and 2 because, in his view, their evidence is neither relevant nor necessary for him to fulfill his mandate dictated by Order in Council 1209/96. With respect, I agree. Mr. Lepofsky, on behalf of the A.G. (Ont.), submitted that because the Commissioner has stated that he would not call the jurors to testify even if the law permitted, the constitutionality of s. 649 of the *Criminal Code* is irrelevant and these proceedings are beside the point. Again, I agree.

3. In my view, the position taken by the Commissioner does not call into question the authority (jurisdiction) of the Commission by way of lack of jurisdiction, excess of

jurisdiction or failure to exercise jurisdiction as required by s. 6 of the Act. Therefore, the Divisional Court cannot intervene.

4. In his reasons, the Commissioner said that he was "fortified in his view" by the words of Finlayson J.A. in *R. v. Selles (supra)*.

5. Across Canada, on a daily basis, jurors, in criminal cases of trial by jury, are told that the trial has thirteen (13) judges; one judge of the law - the trial judge and twelve (12) judges of the facts - the jury.

Those same jurors are also told that:

(1) no one will know what evidence they accepted and what evidence they rejected,

(2) any verdict rendered must be unanimous, but all the jurors need not accept the same evidence in order to reach a verdict.

(3) that they will not have to account to anyone about how they reached their verdict;

(4) when they return to the courtroom after reaching a verdict, the only question that they will be asked will be: "Ladies and Gentlemen of the jury have you agreed upon a verdict(s)?"

6. If jurors are "judges of the facts" in a criminal trial by jury, is there any reason why jurors should not be accorded the same immunity from testifying about their decisions as is afforded to a judge?

7. On November 5, 1971, Donald Marshall Jr. was convicted of murder. Following a reference to the Supreme Court of Nova Scotia Appeal Division by the Minister of Justice under what is now s. 690(b) of the *Criminal Code*, Donald Marshall Jr. was released in May

1983 after a decision of a panel of five (5) justices.

In October 1986, the Attorney General of Nova Scotia established a Royal Commission, pursuant to Nova Scotia's Public Inquiries Act, composed of three (3) out-of-province Superior Court Judges (Hickman, Poitras and Evans) to inquire into the prosecution of Donald Marshall Jr.

At the Marshall Inquiry, no one alleged any impropriety on the part of any juror.

Counsel for the Marshall Inquiry sought to have the five (5) justices of the Supreme Court of Nova Scotia Appeal Division who heard the Reference appear as witnesses before the Royal Commission. When they refused, the Commission issued orders that they attend. Glube C.J. T.D. quashed the orders: (43 C.C.C. (3d) 287); the Appeal Division of the Supreme Court of Nova Scotia dismissed an appeal from Glube C.J. T.D. (46 C.C.C. (3d) 191). Counsel for the Commission appealed to the Supreme Court of Canada; it dismissed the appeal: *McKeigan v. Hickman* (1989), 50 C.C.C. (3d) 449. The following are extracts from the judgment where reference is made to judicial immunity surrounding how a judge reaches her/his decision:

Per Lamer J. at p. 455:

> What evidence a court relies on for arriving at a given conclusion is an integral part of the adjudicative process. . . . But, as regards the justices, they enjoy in that aspect of their functions absolute immunity against being compelled as witnesses before a commission of inquiry such as this one.

Per Cory J. at p. 464:

> A judgment and a judge's reasons for judgment must be put on record and are subject to scrutiny on appeal by the legal community and by the public at large. It is vital to the

> preservation of our system of justice that a judge not be required to answer any questions as to how a decision was reached. The reasons and the decisions speak for themselves. If they are to be questioned an effective and comprehensive means of challenging them is provided by appellate procedures.

Per McLachlin J. at p. 482:

> I return to ss. 3 and 4 of the *Public Inquiries Act*. Nothing in the language of those sections suggests that the legislators intended to clothe the commission with power to abrogate the fundamental principle that judge cannot be compelled to testify as to how and why they arrived at their decisions. . . . Reading ss. 3 and 4 together in accordance with the established principles of statutory construction, I conclude that the Act does not empower the commission to compel the justices who sat on the Marshall appeal to testify as to the grounds for their decision, including the record relied on.

It will be observed that although counsel for the Marshall Commission attempted to summon the five (5) justices of appeal who sat on the Reference, he never attempted to summon the jurors who convicted Donald Marshall Jr.

8. In the case at bar, the Commission is not mandated to investigate the deliberations or impressions of the jury. In my view, the Commission has no power to investigate into the conduct of jurors or their mental processes because they possess an immunity analogous to the immunity of a judge as set out in *McKeigan v. Hickman (supra)*.

V. Result

The application under s. 6(2) of the *Public Inquiries Act* is dismissed.

VI. Costs

No one asked for costs; there will be no order as to costs.

O'Driscoll J.

Steele J.

Somers J.

RELEASED: November 6, 1997

File 704/97

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

O'DRISCOLL, STEELE AND SOMERS JJ.

IN THE MATTER OF The Commission on Proceedings Involving Guy Paul Morin, pursuant to Order in Council 1209/96

AND IN THE MATTER OF the decision of The Honourable Fred Kaufman, Q.C., Commissioner, dated September 23, 1997, declining the applicants' request to section 6(1) of the *Public Inquiries Act*, R.S.O. 1990, Chapter P.41, to state a case to the Divisional Court

AND IN THE MATTER OF an application by Bob, Janet and Kenneth Jessop pursuant to section 6(2) of the *Public Inquiries Act*, R.S.O. 1990, Chapter P.41, for an order directing the Commission to state a case to the Divisional Court

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JUDGMENT

O'DRISCOLL J.

Released: November 6, 1997

PROVINCE OF ONTARIO

MINISTRY OF THE ATTORNEY GENERAL

CROWN POLICY MANUAL

Policy # *S-1*	Original Date November 13, 1997	Update
Physical Scientific Evidence	CROSS REFERENCE: Disclosure Police – Relationship with Crown Counsel	

1. Introduction

Scientific evidence often plays an important part in the determination of criminal liability. Counsel for both the prosecution and the defence routinely use such evidence in support of their cause. For Crown counsel, a number of issues arise respecting how such evidence is gathered, tested, and presented. These issues include the delineation of the Crown's duties of disclosure, the nature of the relationship between the Crown and experts providing opinion evidence for the prosecution, when and how to obtain forensic evidence, and the manner in which such evidence should be presented to the court. The ultimate objective of the Crown in putting forward scientific evidence is to ensure that such evidence is presented to the court with no more and no less than its legitimate force and effect. As in all matters, the prosecutor should be guided by the general duty to see that justice is done in the circumstances of the particular case.

This policy has been jointly prepared and adopted by the Ministry of the Attorney General and the Ministry of the Solicitor General and Correctional Services.

2. Disclosure and Forensic Science

As noted, scientific evidence can play a significant, indeed determinative, role in a criminal trial. The duty of disclosure is, as in other areas, a critical part of the Crown's role in cases where scientific evidence will be adduced as part of the prosecution case, or where it might form part of the case for the defence.

a) Duty with respect to reports and notes of scientists

Reports prepared by forensic scientists consulted by the police during their investigation or retained by Crown counsel to give evidence must be disclosed to defence counsel. As well, the Crown should on request of defence counsel support access to these scientific witnesses and advise scientists of the necessity of providing the defence with access to the underlying documentation, tests or other material which the defence believes is relevant to making full answer and defence. (See Relationship with Science witnesses, following, for a discussion of what Crown counsel can expect in a report.)

b) Duty of disclosure with respect to scientific advisors to the Crown

Paragraph 15 of Crown Policy Manual D1 (Disclosure) provides that Crown counsel generally need not disclose internal Crown counsel notes, memoranda, correspondence or legal opinions. Such material, reflecting only the thought processes and strategies of counsel, is not relevant.

Where scientific evidence is adduced at a trial, Crown counsel may retain an expert to provide advice on questions to be asked in cross-examination of defence experts, reference materials to assist counsel and the strengths and weakness of the opposing expert and the expert's report. Such expert advice need not be disclosed to the defence as it relates to trial strategy and the examination and cross-examination of witnesses. However, an expert witness appearing for either the Crown or the defence may be asked if he or she participated in preparing counsel to examine the opposing expert as it may be relevant to the former's impartiality. (See the *Martin Committee Report*.)

c) Duty to disclose information impeaching defence experts

The duty to disclose relevant information in order to permit the accused to make full answer and defence extends to information relevant to the credibility of witnesses. *Crown Policy Manual* D1-4 (Disclosure) summarizes the duty of Crown counsel to disclose any information in his or her possession relevant to the credibility of any Crown witness.

Further, the Crown also has a duty to disclose all statements obtained from persons who have provided relevant information to the authorities notwithstanding that they are not proposed as Crown witnesses. In the case of expert witnesses testifying for the defence, grounds for impeachment are more likely to arise from, for example, testimony of the expert in other criminal trials. The ability of the defence to obtain the

information through other sources does not ordinarily discharge the obligation the Crown may have to disclose in these circumstances.

Where the Crown is given written notice of an intention on the part of the defence to call a particular expert witness, the prosecutor may, as part of her or his preparation, review previous examinations of that witness. In such cases the Crown is under an obligation to disclose to the defence the previous examinations.

If you are aware of treatises or reports written by the defence expert that so undermine his or her opinion as to make it worthless, the trial process may be expedited by bringing that material to the attention of the defence.

d) Defence Testing

i) After the evidence has been made an exhibit

Section 605 of the Criminal Code provides that Crown counsel or the defence may apply for the release of an exhibit for testing and that a judge may impose terms to safeguard the exhibit and preserve it for use at trial. In deciding whether to consent to such an application each of the following factors should be addressed (and raised with the Court if there is no consent):

1) Any analysis necessary to complete the investigation or preparation for trial has been conducted, or the proposed order would not impair the timely completion of such testing;

2) Any proposed defence analysis would not unduly delay the trial;

3) The defence application is not brought for an improper purpose;

4) The material filed on the application supports a finding that the proposed testing could result in evidence for use in a criminal proceeding. (That is, the scientific process by which the exhibit is to be tested is a "science" such that it would meet the test at law for admission (when considered against a reasonable application of the standard for such evidence) set out in *R v. Mohan*, [1994] 2 S.C.R. 9 and the proposed testing authority is capable of being found to be an 'expert' in that field);

5) The application otherwise complies with the rules of court;

6) Where it is uncertain that the test will be capable of reproduction (e.g. because of destruction of available material) the Crown should seek by consent or court order that the results of any testing or examination be shared with the Crown or police;

7) Where such testing is to take place, Crown counsel should take care to ensure that any order includes terms safeguarding the physical and evidentiary integrity of the exhibit. To this end, it will generally be appropriate to seek to have the court include in the order terms governing the chain of custody, transportation, and storage, as well as the time and place for testing, attendees at testing and requiring that an official appointed by the Crown be present.

ii) Before the evidence becomes an exhibit

In some cases defence counsel may seek the production of material in order to conduct its own tests before that material has become an exhibit in a proceeding (therefore prior to s.605 being engaged). The practice of Crown counsel in this province in the past has been to consent to such testing on terms which ensure appropriate safeguards are available, and where the proposed testing is such that it might yield relevant evidence. Before consenting to defence testing, Crown counsel should address the following factors:

1) Any analysis necessary to complete the investigation or preparation for trial has been conducted, or the proposed order would not impair the timely completion of such testing;

2) Any proposed defence analysis would not unduly delay the trial;

3) The defence application is not brought for an improper purpose;

As well, Crown counsel should consider the appropriateness, in the circumstances of each case, of imposing any of the following conditions for the purposes of preserving the integrity of the evidence for court purposes:

1) defence must indicate nature of test or examination to be undertaken;

2) where it is uncertain that the test will be capable of reproduction (e.g. because of destruction of available material) the results of any testing or examination be shared with the Crown or police;

3) defence expert must attend at the Centre of Forensic Sciences (or other reputable laboratory) and conduct examination or tests on the premises (this condition should only be imposed with the consent of the forensic laboratory concerned);

4) the presence of an official appointed by the Crown while the test is conducted;

5) terms governing the chain of custody, transportation, and storage, as well as the time and place for testing and the attendees at testing and/or any other terms safeguarding the physical and evidentiary integrity of the exhibit.

A sample undertaking is attached as Appendix A.

3. *Relationship with Science Witnesses*

It is the clear duty of government scientists to assist in a neutral and impartial way in criminal investigations. They must act in the cause of justice. (See the decision of the English Court of Appeal in *R. V. Ward*, [1993] 1 W.L.R. 619. See also D. M. Lucas, "*The Ethical Responsibilities of the Forensic Scientist: Exploring the Limits*" (1989), 34 J. of Forensic Science 719).

"The necessity for including in the report any information adverse to the Crown is a matter of educating those who prepare scientific or other expert reports. The Crown should advise all experts that they are not to take an adversarial position, but are to provide the Crown with the results of any tests or information which, arguably, may assist the accused, so that the Crown may make proper disclosure, even though the person preparing the report considers that the results of the test or other information is irrelevant" (Page 233-4 *Martin Committee Report*). Government scientists will be aware of this duty via this policy. Non-government scientists should have this duty brought to their attention, perhaps by including a copy of this policy with the letter of retainer. The information which ought to be provided in the report includes information about all tests conducted by the forensic laboratory in connection with or relevant to the case, including those with inconclusive or negative results. It does not necessarily include generally available background scientific information or opinion relevant to or used in interpreting the results of testing.

In the normal course scientists employed in government sponsored forensic laboratories are exposed more frequently to police investigators and to Crown counsel than to the representatives of the defence. Indeed, the function of the forensic scientist is in part to assist in the investigation of crime which is carried out primarily by police officers. The forensic scientist, therefore, assists police officers. (See Roger, "*Does*

Forensic Science Have a Future", J. For. Sci. Soc. (1984) 543.) Investigators must necessarily provide background information arising from their investigation in submitting articles for testing so that forensic scientists can determine the most effective and appropriate scientific approach to possible evidence. This gives the scientist a measure of autonomy in the making of investigative decisions, but also exposes the scientist to the police theory of the case. Finally, where the results of the scientific investigation inculpate the suspect, the scientist becomes a necessary witness for the prosecution and will be exposed to, and be part of, the development of the Crown's case. All of this is, of course, entirely proper and does not mean that the integrity of the scientists is suspect.

However, because forensic scientists working in government-operated laboratories are more familiar with police and prosecution personnel and with prosecutorial approaches and concerns, there may be a tendency for them to feel 'aligned' with the Crown. In some jurisdictions this understandable relationship between the prosecution and forensic scientists has resulted in a perception on the part of the scientists that their function was to support the police theory. Such a perception is wrong and has the potential to contribute to a miscarriage of justice.

Forensic scientists are subject to their own rules of ethics which require impartiality (these are attached as Appendix B). While it is not the Crown's or the scientist's function to supervise or control the professionalism of the other, the purpose of this joint policy is to reinforce the necessity of a clear and impartial presentation of the evidence to the court. This will protect the integrity of the role of government scientists and ensure that their evidence is available with all its legitimate force in the criminal process.

In seeking information and advice from forensic scientists, this policy emphasises that Crowns are seeking a candid opinion. Candour is necessary in order to assist the Crown in exercising its prosecutorial discretion and in preparing its case for trial. The value of early case conferencing is highlighted by Mr. Justice Archie Campbell in his 1996 *Bernardo Investigation Review*. Participation in case conferencing where possible will provide Crown counsel with the opportunity to clarify issues and establish an appropriate relationship with forensic scientists. Where possible it is preferable that a police officer be present to take notes of any meetings with the forensic expert and those notes should be disclosed to all parties.

4. Retaining Other Expert Witnesses

The Centre of Forensic Science has expertise in many areas and should remain the laboratory of choice for expert evidence. If a science is not available at the Centre,

the experts there are likely to be able to direct Crown counsel to appropriate experts elsewhere. As well, the Office of the Chief Coroner is a helpful source of information about medical experts in a wide variety of subjects.

In any case in which it is proposed that the Crown should retain an expert witness (whether scientific or otherwise) for the purpose of giving evidence or assisting the Crown to prepare for trial, the approval of the Director of Crown Operations for the region in which the prosecution originates must be obtained. Directors of Crown Operations may delegate their authority in respect of approving such expenditures to Crown Attorneys within their region.

5. Presenting Forensic Scientific Evidence at Trial

Counsel with carriage of particular prosecutions are responsible for determining how best to present individual cases in a manner consistent with their various duties. The following observations are not intended to limit the otherwise broad discretion vested in counsel in this regard.

Scientific evidence should be presented in such a way that everyone involved (witness, counsel, judge, jury) understands the evidence and its relationship to the issues in the case. In cases tried by a jury this is particularly challenging for counsel.

In many cases, much of the evidence to be presented by a scientist will be agreed upon between the parties. The basic science behind DNA testing, for example, is now rarely challenged. Counsel should consider using pre-trial conferences to determine the real areas of dispute with respect to proposed evidence of a scientific nature, so as to focus the presentation of such evidence on those real issues. It may be that in such pre-trial discussions it will become apparent that further consultation with the scientist might resolve some outstanding issues and it is appropriate in such cases for the Crown to seek such additional consultation. Where there is no real issue respecting aspects of the proposed evidence, those aspects may be presented in the form of admissions or in the form of a report from an expert.

The presentation of difficult scientific evidence can be greatly enhanced by the use of visual aids (overhead slides, computer projections, charts, demonstrations, videotaped tours of facilities). It could be dangerous to use a visual aid in court without first reviewing it with the scientist to ensure that it accurately conveys the true force and effect of the evidence. If it is proposed that such aids are to be used to make scientific evidence more understandable to the jury, their use should first be canvassed with the judge out of the presence of the jury, and most often in a pre-trial conference or motion prior to the selection of the jury. Where such aids are used they should be properly

exhibited and thereby entered into the record. If aids include audiovisual presentations (overhead projections or slides) Crown counsel should endeavour to preserve the record by attempting to have representative portions of such material exhibited, and, where appropriate, making observations on the record.

The objective of the Crown must always be to see that the expert's opinion is presented to the jury with nothing more or less than its legitimate force and effect. It is important to ensure that experts understand that, if at the end of their testimony they are concerned that a misleading impression of their evidence has been left with the triers of fact, they should relay that concern to the officer-in-charge as soon as possible. The information given to the officer by the scientist triggers an immediate disclosure obligation to the defence. Counsel should be aware that scientists from the Centre of Forensic Science are alive to this obligation.

In presenting expert evidence it is, of course, important to remember that many scientific fields use technical jargon which has a different connotation in normal parlance. It is important then that counsel presenting scientific evidence to a jury take care to ensure that the expert's opinion is expressed in terms which permit the jury to either appreciate the significance of such technical jargon, or that these terms are appropriately translated to less idiosyncratic terms.

6. Post-Trial Issues

Appeals

The Crown is under a continuing duty to make timely disclosure of evidence and information in its possession relevant to the guilt or innocence of the accused so long as a case remains before the courts in any form. Where the Crown becomes aware of evidence or information of a forensic nature relevant to an outstanding appeal the Crown is obliged to bring this to the attention of the defence so it they may consider whether to seek further testing and so that they may consider whether to bring an application to adduce fresh evidence. (In such circumstances the observations set out above with respect to the release of exhibits for scientific testing apply with the necessary modifications.)

Applications Under Section 690 and other Extra-Judicial Reviews

Following a finding of guilt confirmed on appeal, an accused will have, ordinarily, exhausted the opportunities provided to review in a judicial forum his or her conviction. The *Criminal Code* provides for a form of ministerial review (founded in the Royal prerogative of mercy) pursuant to s.690. This authority is vested in the federal Minister

of Justice, with the assistance of the Court of Appeal (if requested by the Minister and/or the Supreme Court of Canada under the Supreme Court of Canada Act).

Further, in some cases the federal Minister of Justice may undertake a review of a conviction outside the formal s.690 process.

Such reviews (whether under the s.690 framework or otherwise) are initiated by an application by or on behalf of the convicted person and may be based on a wide range of factors including changes in the law or challenges to the factual validity of the conviction. In some cases this may involve a request for new or additional scientific testing.

All such requests, whether as part of the formal s.690 process or as part of an ad hoc effort by an offender or his or her representative, should be referred to the attention of the Director of the Crown Law Office - Criminal.

Such requests will be considered on a case by case basis by the Director of the Crown Law Office - Criminal in consultation with the Director of Crown Operations for the region in which the case was prosecuted.

APPENDIX A

Court file no.

ONTARIO COURT OF JUSTICE
(_____ DIVISION)

BETWEEN:

HER MAJESTY THE QUEEN

- and -

_____
(Specify name of accused)

DEFENCE UNDERTAKING RESPECTING THE TESTING OF PHYSICAL SCIENTIFIC EVIDENCE

I, _____, counsel for the accused, hereby undertake as follows *(Tick off the appropriate paragraphs):*

☐ The tests or examinations to be conducted on *[describe the physical evidence to be tested]* _____ are as follows:

_____

_____

☐ To provide the results of any testing or examination to *[insert name of Crown counsel or a police officer]* _____.
(It is appropriate to request this undertaking where the test will be incapable of reproduction, for example because of destruction of available material.)

☐ That the tests or examinations to be conducted by forensic scientists on behalf of the accused shall only be conducted on the premises of the Centre of Forensic Sciences or _ _____ *[insert name of alternate forensic laboratory]*
(N.B. This condition should only be imposed with the consent of the forensic laboratory concerned.)

☐ To notify _____ *[insert name of an official appointed by the Crown]* of the time and place for the conduct of the tests or examinations in order that said official may be present while the test is conducted.

☐ To take the following steps to ensure the continity of the evidence _____

_____

_____

_____ _____
Counsel for the Accused Date

APPENDIX B

Rules of Professional Conduct ADOPTED NOVEMBER 5, 1994

Members of the Canadian Society of Forensic Science,

with respect to their responsibilities to the C.S.F.S., shall:

1. comply with the By-laws of the Society;

2. report to the Board, any violation of these "Rules of Professional Conduct" by another member of the Society;

3. accept that their membership in the Society demonstrates an active interest in forensic science however, this membership does not by itself mean that they have the necessary qualifications to practice in their forensic science discipline nor does it mean that they are competent in their forensic science discipline;

with respect to their responsibilities to their client, employer or to the court, shall:

4. treat all information from an agency or client with the appropriate confidentiality;

5. make all reasonable efforts to treat items of potential evidential value with the care and control necessary to ensure their integrity;

6. take reasonable steps to ensure that all items in a case receive appropriate technical analysis;

7.a. utilize methods, techniques, standards and controls, provided that they exist, that they are generally accepted and that they are current and;

b. utilize methods and techniques with standards and controls to conduct examinations and analysis such that they could be reproduced by another qualified and competent person;

8. make full and complete disclosure as required by law of the findings to the submitting agency or client;

9. make and keep worknotes on all items received, the examinations done, the results obtained and the findings and conclusions made in a timely fashion;

10. render opinions and conclusions strictly in accordance with the results and findings in the case and only to the extent justified by those results and findings;

11. make all efforts to testify in a clear, straightforward manner and refuse to extend themselves beyond their field of expertise or level of competence;

12. not exaggerate, embellish or otherwise misrepresent qualifications when testifying;

13. be impartial and independent in their analysis, reporting and testimony;

with respect to their responsibilities to the profession of forensic science, shall:

14. carry out their duties in a professional manner and strive to be worthy of the confidence of the public;

15. regard and respect their peers with the same standards that they hold for themselves;

16.a. set a reasonable fee for services if it is appropriate to do so, taking care not to set unreasonably high fees for services, not to charge fees for services not done or services that are unnecessary, while being able to reduce or waive fees;

16.b. not, under any circumstances, render services on a contingency basis; and

17. strive to maintain and improve their skills and knowledge and to keep current with advances and standards in their discipline.



Ministry of the Attorney General
Ministère du Procureur général

Office of the Assistant Deputy Attorney General (Criminal Law Division)
Bureau du Sous-procureur général adjoint (Division du droit criminel)

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MEMORANDUM

DATE: December 23, 1993

TO: All Directors/Regional Directors
All Crown Attorneys
All Assistant Crown Attorneys
All Crown Counsel

FROM: Michael Code
Assistant Deputy Attorney General
Criminal Law Division

RE: **CROWN POLICY MANUAL**

****

- Attached please find your copy of the Ministry's new Crown Policy Manual.

- It represents the culmination of about 2 years of work by a small committee of very dedicated counsel of all levels of seniority within the Division. Bruce Long, Paul Taylor, Bob Morris, Rick Libman, Steven Foulds and Mary Nethery, who was the committee chair, deserve a tremendous amount of credit for updating all of our existing policies and drafting new ones.

- The committee's work was completed in the Spring of 1993 but we delayed sending the Manual out to you because of the impending release of the Martin Report. It was clear that our response to that Report would require the development of a number of new policies. Because of the significance of these policies, all of the Division's senior management - Regional Directors, Directors and myself - personally took on the difficult task of drafting 3 new policies on Charge Screening, Disclosure and Resolution Discussions. I want to thank Norm Douglas, Diana Fuller, Peter Griffiths, Bruce Long, Leo McGuigan, Dan Mitchell, Larry Owen, Murray Segal, Jim

PROVINCE OF ONTARIO

MINISTRY OF THE ATTORNEY GENERAL

CROWN POLICY MANUAL

Policy # *I-2*	Original Date November 13, 1997	Update
In-Custody Informers	CROSS REFERENCE: Disclosure	

Introduction

This Policy is intended to provide Crown counsel with guidance respecting the use of evidence from witnesses who are characterised as ***In-Custody Informers***, sometimes called "jailhouse informers". **For the purpose of this policy, an *In-Custody Informer* is someone who**

(a) receives one or more statements from an accused,
(b) while both are in custody,
(c) where the statements relate to offences that occurred *outside* of the custodial institution.

The informer initially may wish to remain anonymous or may be prepared to testify. Excluded from this definition are informers who have direct knowledge of the offence independent of the statements of the accused (even if a portion of their evidence includes a statement made by the accused).

This policy is not intended to address the use of undercover operatives outside the custodial setting, nor to limit the use of the evidence of in-custody informers to advance police investigations. As well, even if Crown counsel decides not to adduce the evidence of an in-custody informer, that evidence may be considered by the Crown in exercising his or her discretion in respect of whether it is in the public interest to proceed with the case.

Whether to Present the Evidence of a In-Custody Informer

The evidence of an in-custody informer is admissible in court and can properly form part of the case for the Crown. Such evidence is, however, subject to a number of frailties, and these frailties should normally cause counsel to examine carefully whether, in the circumstances of the particular case, such evidence ought to be presented to the Court. In making such a determination Crown counsel should have in mind that by definition in-custody informers are detained by authorities, either awaiting trial or serving a sentence of imprisonment. Their circumstances are such that they may seek, and in rare cases will receive, some benefit for their participation in the Crown's case. The danger of an unscrupulous witness manufacturing evidence for personal benefit cannot be overlooked, and this possibility should inform a prosecutor's exercise of discretion respecting the presentation of such evidence.

In deciding whether to present the evidence of an in-custody informer to the court, Crown counsel should, at a minimum, consider the following matters:

1. The use of an in-custody informer as a witness should only be considered in cases in which there is a compelling public interest in the presentation of their evidence. This would include the prosecution of serious offences.

2. It is unlikely to be in the public interest to initiate or continue a prosecution based ***only*** on the unconfirmed evidence of a In-Custody Informer. Confirmation of evidence is not the same as corroboration. In the context of evidence from an In-Custody Informer, confirmation is evidence or information available to the Crown which contradicts a suggestion that the inculpatory aspects of the proposed evidence of the informer was fabricated. If the Crown's case is based exclusively, or principally, on evidence of an in-custody informer, the prosecutor ***must*** bring the case to the attention of their supervising Director of Crown Operations as soon as practicable and the Director's approval must be obtained before taking the case to trial

3. Crown counsel are reminded that an in-custody informer, like any other informer, may enjoy the protection of 'informer privilege' (see *R. v. Leipert* (1997), 112 C.C.C.(3d) 193 (S.C.C.)). Before disclosing information tending to identify an informer, or calling their evidence, Crown counsel ***must*** determine that the in-custody informer has either not claimed, or has given an informed waiver of, that privilege.

4. Police should not recruit an inmate to act as their agent to solicit a statement from another inmate except in accordance with the safeguards set out in *R. v. Broyles* (1991) 68 C.C.C.(3d) 308 (S.C.C.).

Crown counsel assessing the reliability of an informer's report of a statement by an accused may take into account the following matters:

1. whether the informer made some written or other record of the words spoken by the accused, and if so, whether the record was made contemporaneous to the statement of the accused, or is otherwise a reliable record;
2. the circumstances under which the informer's report of the statement was taken (e.g., report made immediately after the statement was made, report made to more than one officer, the informer's prior knowledge of offence or accused)
3. the reliability of an informer's report of an in-custody statement will generally be enhanced if it is given under oath and recorded on audio or video tape. (In this respect, the police should be encouraged to follow the guidelines set down in *KGB*.)
4. the manner in which the report of the statement is taken by the police (e.g., use of non-leading questions, thorough report of words spoken by accused, thorough investigation of circumstances which might suggest opportunity (or lack of opportunity) to fabricate a statement)
5. an awareness of any evidence that may attest to or diminish the credibility of the informer including the presence or absence of any relationship between the accused and the informer;
6. the extent to which the statement is confirmed in the sense set out in 1.4, above;
7. the informer's general character including his or her criminal record;
8. any request the informer has made for benefits or special treatment and any promises which may have been made by a person in authority in connection with the provision of the statement or an agreement to testify; and
9. whether the informer has in the past given reliable information to the authorities.
10. Whether the informer has previously claimed to have received statements while in custody

In this respect counsel should ensure that the background of the informer has been appropriately investigated. Part of this police investigation should include a review of any available registry of informers who have testified in circumstances such as those described in this policy.

Limits on Dealing with In-Custody Informers

Crown counsel must be sensitive to the distinction between a "true informer" who comes forward to the police with existing information and an "agent of the state", as defined by *R. v. Broyles* (1991) 68 C.C.C.(3d) 308 (S.C.C.), who is placed in contact with the accused for the specific purpose of obtaining a statement from the accused. An agent of the state must not compromise the right of the accused to remain silent. The test set out in *R. v. Broyles* is "*Would the exchange between the accused and the informer have taken place in the form and manner in which it did take place, but for the intervention of the state or its agent*".

In dealing with in-custody informers prior to trial it is important for Crown counsel to keep in mind that any direct contact they have with an informer may become the subject of some future *voir dire* or other proceeding. Counsel dealing with an informer should not therefore, ordinarily, be counsel ultimately expected to conduct of the prosecution.

In many cases In-Custody Informers will have counsel to assist them in respect of charges they face or related matters and in such cases it is appropriate for the Crown and police to deal with the witness through counsel (to the extent that this is reflective of the informed desires of the witness). In any case where an In-Custody Informer has sought the benefit of informer privilege Crown counsel should act to facilitate the availability of independent counsel for the witness. This may be done through the Ontario Legal Aid Plan, funding available from some police agencies, or through some special arrangement. In any case where it is proposed that counsel be available to the witness other than through OLAP or a conventional private retainer, Crown counsel should consult with the Director of Crown Operations for the region in which the prosecution is to take place.

Disclosure

The dangers of using in-custody informers in a prosecution give rise to a heavy onus on Crown counsel to make complete disclosure. Without limiting the extent of that onus, the following is a list of items for disclosure that Crown counsel should review to ensure disclosure is both full and fair:

1. the criminal record of the in-custody informer including, where available, the synopsis relating to any convictions;

2. any information in the prosecutors possession or control respecting the circumstances in which the informer may have previously testified for the Crown as an informer, including at a minimum the date, location and court where the previous testimony was given (the police in taking the informer's statement should inquire into any prior experiences testifying for either the provincial or federal Crown as an informer);

3. any offers or promises made by police, corrections authorities, Crown counsel, or a witness protection program to the informer (or person associated with the informer) in consideration for the information in the present case;

4. any benefit given to the informer, members of the informer's family, or any other person as consideration for their co-operation with authorities, including (but not limited to):

   - financial benefits;
   - beneficial treatment while in custody;
   - early consideration for parole;
   - outstanding charges reduced, stayed or withdrawn;
   - a reduced sentence on outstanding charges,
   - promises of 'best efforts' respecting any of the above, or
   - any form of future indemnity;

5. where possible, any arrangements providing for a benefit (as set out above) to a witness should be recorded on audio or video tape or reduced to writing and approved by a Director of the Criminal Law Division and disclosed to defence *prior to* receiving the testimony of the witness;

6. copies of the notes of all police officers, corrections authorities or Crown counsel who made any promises of benefits or negotiated a benefit with a in-custody informer;

7. the circumstances under which the in-custody informer and his or her information came to the attention of the authorities; and

8. if the informer will not be called as a Crown witness a disclosure obligation still exists subject to the informer's privilege.

While complete disclosure must always be made when calling a in-custody informer as a witness, the ***timing*** of that disclosure must be carefully considered and is a matter that remains within the sound discretion of prosecuting counsel.

The safety of the in-custody informer can be endangered if disclosure is made before authorities can attend to providing for the personal security of the informer. It will be appropriate to confer with police and correctional authorities prior to making disclosure. (The Disclosure guideline D-1 should be reviewed to gain advice and assistance on procedures to be followed when disclosure is delayed.)

Informer Privilege

The obligations respecting disclosure as set out above are triggered when the informer consents to be a witness. If the in-custody informer does not intend to give testimony or make their statement known to the public, then they may be entitled to an informer's privilege. Prior to making disclosure, the informer should be told he/she may have a privilege. If an informer does not waive the privilege then Crown counsel is not permitted to disclose information tending to identify the informer.

CROWN POLICY MANUAL-IN-CUSTODY INFORMERS

Introduction

This policy is intended to provide Crown counsel with guidance respecting the use of evidence from witnesses who are characterized as in-custody informers, sometimes called "jailhouse informers". **For the purposes of this policy, an in-custody informer is someone who:**

(a) allegedly receives one or more statements from an accused
(b) while both are in custody
(c) where the statements relate to offences that occurred outside of the custodial institution.

The accused need not be in custody for, or charged with, the offences to which the statements relate.

The informer initially may wish to remain anonymous or may be prepared to testify. Excluded from this definition are informers who allegedly have direct knowledge of the offence independent of the alleged statements of the accused (even if a portion of their evidence includes a statement made by the accused).

This policy is not intended to address the use of undercover operatives outside the custodial setting, nor to limit the use of the evidence of in-custody informers to advance police investigations. As well, even if Crown counsel decides not to adduce the evidence of an in custody informer (for reasons unrelated to that informer's lack of reliability), that evidence may be considered by the Crown in exercising his or her discretion in respect of whether it is in the public interest to proceed with the case.

Though this policy does not address, for example, the use of informers outside the custodial setting or the use of in-custody persons whose evidence relates to offences within the custodial institution, Crown counsel should be mindful of the concerns which motivate this policy, to the extent applicable, in the exercise of his or her discretion generally.

Whether to Present the Evidence of a In-Custody Informer

The evidence of an in-custody informer is admissible in court and can properly form part of the case for the Crown. Such evidence has resulted in miscarriages of justice in the past or been shown to be untruthful. Most such informers will seek benefits for their contemplated participation as witnesses for the prosecution. By definition, in-custody informers are detained by authorities, either awaiting trial or serving a sentence of imprisonment. The danger of an unscrupulous witness manufacturing evidence for personal benefit is a significant one. Crown counsel must therefore examine carefully whether, in the circumstances of the particular case, such evidence ought to be presented to the court.

Note: several lines were also omitted as superfluous.

In deciding whether to present the evidence of an in-custody informer to the court, Crown counsel should, at a minimum, consider the following matters:

1. The use of an in-custody informer as a witness should only be considered in cases in which there is a compelling public interest in the presentation of their evidence. The seriousness of the offence, while relevant, will not, standing alone, demonstrate a compelling public interest in the presentation of their evidence.

2. It will not be in the public interest to initiate or continue a prosecution based only on the unconfirmed evidence of an In-custody Informer. Confirmation of evidence is not the same as corroboration. In the context of evidence from an In-Custody informer, confirmation is credible evidence or information available to the Crown, independent of the In-custody informer, which significantly supports the accuracy and reliability of the inculpatory aspects of the proposed evidence of the informer. If the prosecutor determines that the prosecution's case may rely, in part, on evidence of an in-custody informer, the prosecutor must bring the case to the attention of their supervising Director of Crown Operations as soon as practicable and the approval of the In-Custody Informer Committee (composed of senior prosecutors from across the province) must be obtained before that evidence may be used in the criminal proceedings.

3. As is

4. As is

The Committee, in determining whether approval will be given, and the prosecutor, in determining whether approval will be sought, must assess the reliability of the informer's report of a statement by an accused, taking into consideration, at a minimum, the following matters:

1. The extent to which the statement is confirmed in the sense set out in 1.2 above

2. The specificity of the alleged statement. For example, a claim that the accused said "I killed AB" is easy to make but extremely difficult for any accused to disprove.

3. The extent to which the statement contains details or leads to the discovery of evidence only known to the perpetrator.

4. The extent to which the statement contains details which could reasonably be accessed by the in-custody informer, other than through inculpatory statements by the accused. This consideration need involve an assessment of the information reasonably accessible to the in-custody informer, through media reports, availability of the accused's Crown brief in jail etc. Crown counsel should be mindful that, historically, some informers have shown great ingenuity in securing information thought to be unaccessible to them. Further, some informers have converted details communicated by the accused in

the context of an exculpatory statement into details which purport to prove the making of an inculpatory statement.

5. The informer's general character, which may be evidenced by his or her criminal record or other disreputable or dishonest conduct known to the authorities.

6. Any request the informer has made for benefits or special treatment (whether or not agreed to) and any promises which may have been made (or discussed with the informer) by a person in authority in connection with the provision of the statement or an agreement to testify.

7. Whether the informer has in the past given reliable information to the authorities.

8. Whether the informer has previously claimed to have received statements while in custody. This may be relevant not only to the informer's reliability but, more generally, to the public interest in utilizing the informer (e.g. the informer who has received benefits for past information, then reoffended and who now seeks benefits for new information.)

9. Whether the informer has previously testified in any court proceeding, whether as a witness for the prosecution or the defence or on his or her behalf and any findings in relation to the accuracy and reliability of that evidence.

10. Whether the informer made some written or other record of the words allegedly spoken by the accused, and if so, whether the record was made contemporaneous to the alleged statement of the accused NOTE: words which follow are omitted

11. The circumstances under which the informer's report of the alleged statement was taken (e.g. report made immediately after the statement was made, report made to more than one officer). NOTE: words which follow are omitted

12. The manner in which the report of the statement is taken by the police (e.g. through use of non-leading questions, thorough report of words spoken by the accused, thorough investigation of circumstances which might suggest opportunity or lack of opportunity to fabricate a statement. Police should be encouraged to address all of the matters relating to the Crown's assessment of reliability with the informer at the earliest opportunity. Police should also be encouraged to take an informer's report of an alleged in-custody statement under oath, recorded on audio or video tape, in accordance with guidelines set down in KGB. However, in considering items 10-12, Crown counsel should be mindful that an accurate, appropriate and timely interview by police of the informer may not adequately address the dangers associated with this kind of evidence

13. The existence of any other evidence that may attest to or diminish the credibility of the informer including the presence or absence of any relationship between the accused and the informer.

In this respect, counsel should ensure that the background of the informer has been appropriately investigated. Part of this police investigation should include a review of any available registry of informers who have testified in circumstances such as described in this policy. (NOTE: such a registry will impose obligations upon Crown counsel to report the use of informers for recordation.)

Limits on Dealing with In-Custody Informers

As is, plus the following paragraph.

Where benefits are conferred upon or promised to an in-custody informer, the arrangement should, absent exceptional circumstances, be reduced to writing and signed by the in-custody informer and/or recorded on audio or videotape. This arrangement should provide that the in-custody informer should expect no additional benefits to be conferred and, specifically, that the in-custody informer should expect no additional benefits in relation to future or as of yet undiscovered criminality. Indeed, such criminality may disentitle the in-custody informer to any benefits not yet conferred. Where the in-custody informer subsequently seeks additional benefits nonetheless (Particularly in connection with additional criminal charges which he or she faces or may face) prior to the completion of any testimony he or she may give, Crown counsel and the In-custody Informer Committee are obligated to reassess the use of the in-custody informer as a witness in accordance with the criteria set out above. Similarly, where additional benefits are sought by the in-custody informer subsequent to his or her completed testimony (particularly in connection with additional criminal charges which he or she faces or may face), they should only be conferred in exceptional circumstances and only to the extent necessary to address those exceptional circumstances (e.g. confirmation to the custodial authorities that the in-custody informer may be in danger due to prior testimony).

Where an in-custody informer has lied to the authorities or to the court, Crown counsel should support the prosecution of that informer to the appropriate extent of the law, even if his false claims were not to be tendered in a criminal proceeding. The prosecution of informers who attempt (even unsuccessfully) to falsely implicate an accused is, of course, intended, inter alia, to deter like minded members of the prison population.

Disclosure

The dangers of using in-custody informers in a prosecution give rise to a heavy onus on Crown counsel to make complete disclosure. Without limiting the extent of that onus, the following is a list of items for disclosure that Crown counsel should review to ensure disclosure is both full and fair:

1. The criminal record of the in-custody informer including, where accessible to the Crown, the synopsis relating to any convictions

2. Any information in the prosecutors possession or control respecting the circumstances in which the informer may have previously testified for the Crown as an informer, including at a

minimum the date, location and court where the previous testimony was given (the police in taking the informer's statement should inquire into any prior experiences testifying for either the provincial or federal Crown as an informer or as a witness generally)

3. As is

4. Any benefit given to the informer, members of the informer's family or any other person (or any benefits sought by such persons) as consideration for .... (as is)

5. As noted earlier, any arrangements providing for a benefit (as set out above) should, absent exceptional circumstances, be reduced to writing and signed by the informer and/or recorded on audio or videotape. Such arrangements must be approved by a Director of the Criminal Law Division or the In-Custody Informer Committee and disclosed to the defence prior to receiving the testimony of the witness (or earlier, in accordance with Stinchcombe).

6. Copies of the notes of all police officers and corrections authorities that may be relevant in relation to the informer and copies of the notes of such persons or Crown counsel who made, or were present during, any promises of benefits to, any negotiations respecting benefits with, or any benefits sought by, an in-custody informer.

7. As is

8. Any information that may be relevant to the informer's report, having regard to items 1 to 13 listed as matters to be considered by Crown counsel above.

9. Same as old number 8

GENERAL INVESTIGATIONS

04-17 Informant Registry

GENERAL

Collecting information is the investigative essence of police work. Through the use of informants, police learn of people involved in criminal activities and informants provide a continued source of timely, reliable information on individuals, groups and/or organizations involved in criminal activity. All members of the Service are encouraged to be alert to opportunities to develop contacts, sources, and informants.

DEFINITIONS

AGENT - an agent source tasked by investigators to assist in the development of target operations. Direct involvement and association may result in their becoming a material and compellable witness.

AGENT PROVOCATEUR - an informant who deliberately, by harassment or threat, instigates or provokes a person into committing an illegal act; an act this person would not normally commit and thereby entrapping that person.

CRIMINAL INFORMANT - an informant who provides information gained through criminal activity or association with others involved in criminal activity.

INFORMANT - a giver of information.

There are three types:

- criminal informant
- source
- contact

INFORMANT REGISTRY FILE - a record of informant information and identity maintained by the Intelligence Branch.

GENERAL INVESTIGATIONS
04-17 Informant Registry

INFORMANT HANDLER - that member of the Durham Regional Police Service who recruits a Criminal Informant and then continues to directly manages and utilizes his/her services.

INFORMANT REGISTRY CONTINUATION REPORT - a continuing record of all subsequent dealings with criminal informants or agents. This report will be identified by the Criminal Informants' or Agents' number only.

SOURCE - a person who supplies information, not necessarily regarding criminal matters, on a continuing basis, but not for gain.

THIRD PARTY RULE - the highest level of security regarding information and identification. It denotes that there shall be no dissemination without consent of the author.

THE INFORMANT HANDLER, shall;

- upon recruiting a Criminal Informant or Agent will conduct checks with Local RMS File, CPIC, criminal records
- report the recruitment of the confidential Criminal Informant or Agent to the Officer In Charge of the Intelligence Branch by submitting an Informant Registry Report [DRP 211]
- assist the Officer In Charge of the Intelligence Branch or designate in determining the credibility, value, motive for participation and acceptability of the Informant or Agent
- in the case of a Contracted Agent will submit forthwith a signed Informant Agreement Form [DRP 211B]
- all contact shall be documented on an Informant Registry Continuation Report [DRP 211A] and forward to the Officer In Charge of Intelligence Branch

- Shall not agree to any payment without the prior approval of the Officer In Charge of the Intelligence Branch
- submit all requests for payment/expenses to the Officer In Charge of the Intelligence Branch
- payment of monies to the Criminal Informant or Agent are to be made by the Informant Handler, only after positive results are achieved
- Shall not contact the Crown Attorney's office for the purpose of plea-bargaining considerations; these arrangements will be made by the Officer In Charge of the Intelligence Branch.

RULES FOR THE INFORMANT HANDLER

- at no time will the Informant Handler, counsel, instigate or sanction the Criminal Informant or Agent into committing a Criminal offence
- the Informant Handler should attempt to verify any information received from the Criminal Informant or Agent through independent sources
- the Informant Handler will indicate within the Informant Registry, [DRP 211] and Continuation Report [DRP 211A], the reliability of the information received from the Criminal Informant or Agent

THE INFORMANT HANDLER SHALL NOT

- mislead the court to protect the Criminal Informant or Agent
- contact the Criminal Informant or Agent from his/her residence without using the protection of Call Block provided by Bell Canada
- discuss police business with the Informant or Agent
- discuss personal business or the personal business of other members of the Service in the presence of the Informant or Agent
- introduce a Criminal Informant or Agent to his/her family or to the family of any other member of the Service

- allow his/her family to accept a gift directly or indirectly from a Criminal Informant or Agent
- seek information under circumstances prohibited by law
- develop, task or pay a Young Person as a Criminal Informant or Agent without consulting the parent or guardian, but information volunteered may be accepted
- enter into any form of agreement or contract with a Criminal Informant or Agent without the approval of the Officer In Charge of the Intelligence Branch
- direct Criminal Informants or Agents on parole, probation or recognizance in any manner that could constitute a breach of the law
- permit Criminal Informants or Agents to conduct illegal activities
- jeopardize the safety of a Criminal Informant or Agent by disclosing his identity
- **DISCLOSE AN INFORMANT'S IDENTITY IN COURT EXCEPT WHERE THE ADMINISTRATION OF JUSTICE REQUIRES OTHERWISE.** Should the court insist upon disclosure and the Informant's safety could be jeopardized if his/her identity is disclosed, the Handler will request the Crown Attorney to seek an adjournment to allow him/her to prepare the necessary arguments to prevent disclosure or to withdraw the charge. Where possible, this should be arranged prior to the commencement of the trial
- MAKE PROMISES TO A CRIMINAL INFORMANT OR AGENT THAT THEY CANNOT FULFIL.

THE INFORMANT HANDLER SHALL

- ensure that an Alternate Handler be assigned to each Criminal Informant or Agent, unless exceptional circumstances exist, and approved by the Officer In Charge of the Intelligence Branch or designate
- ensure that an Alternate Informant Handler be present when the Criminal Informant or Agent is of the opposite sex to the Informant Handler

- ensure that an Alternate Informant Handler is to be present when a Criminal Informant or Agent receives monetary remuneration. Both the Informant Handler and Alternate shall sign the Informant Registry Continuation Report
- ensure that the Criminal Informant or Agent is aware that all terms, conditions and instructions given to the Criminal Informant or Agent are adhered to at all times

OFFICER IN CHARGE OF THE INTELLIGENCE BRANCH

- will be the Criminal Informant or Agent Co-ordinator for the Durham Regional Police Service and will maintain a master index system of all Criminal Informants and Agents. The Officer In Charge shall also be responsible for maintaining security over this file and under no circumstances divulge the contents of the file to any person(s) without the authorization of the Chief of Police or his designate
- assess the information and determine if the Criminal Informant or Agent is worthy of being coded and accepted as a Criminal Informant or Agent and further assess if the value of the information being received is equal to payment expected by the Criminal Informant or Agent
- upon determining the acceptability of the Criminal Informant or Agent; ensure that a completed Informant Registry Report is completed
- conduct an additional background check of the Criminal Informant or Agent utilizing the Automated Criminal Intelligence Information System (ACIIS) and the Ontario Criminal Intelligence Information System (OCIIS)
- establish a Code Number for the Criminal Informant or Agent
- open a "THIRD PARTY RULE" file which will contain all information regarding the Criminal Informant or Agent obtained from Intelligence checks and the Informant Registry which will further contain all material relative to the assessment, payment and general handling of the Informant

- review debriefing reports to link information, identify situations and identify training needs
- advise the Informant Handler of the Informant Identification Number that is assigned to the Criminal Informant
- inform the Informant Handler that all future correspondence and all notebook notations regarding the Criminal Informant or Agent shall refer to the code number supplied
- review the value of the information being received and the payment expected by the Criminal Informant for said information
- prepare, if required, formal contracts between the Agent and the Service assisted by the Crown Attorney's Office
- monitor and evaluate all subsequent dealings between the Informant Handler(s) and the Criminal Informant or Agent
- decide whether the services of the Criminal Informant or Agent are to be continued
- in the event that an Informant/Agent has acted or is acting in the capacity of an "Agent Provocateur," ensure that the Superintendent of Operations be notified immediately
- determine if information is suitable for payment for the Criminal Informant or Agent fees/expenses up to and including five hundred dollars. Request for funds in this amount must be made to the Superintendent of Operations
- in the event that funding exceeds five hundred dollars ($500.00)make arrangements for the appropriate funding to be obtained from the Superintendent of Operations by written request, except in cases of emergency when verbal authorization is sufficient
- in the event, that the Criminal Informant or Agent is motivated by reward by way of plea bargaining consideration; contact and deal directly with the Crown Attorney for the Region of Durham
- ensure that the Informant Handler has completed all of the necessary forms

GENERAL INVESTIGATIONS
04-17 Informant Registry

DUTIES OF THE SUPERINTENDENT OF OPERATIONS

The Superintendent or designate shall keep an Expense Ledger in which all transactions relating to Criminal Informants and Agents will be logged. The Criminal Informant or Agent shall be identified by their Code Number only. This Expense Ledger will be audited annually by the Financial Branch of our Service.

NOTE: *All members shall familiarize themselves with the Informant Registry Policy.*

IN THE MATTER OF the Commission on Proceedings Involving Guy Paul Morin, pursuant to Order In Council 1209/97;

The Honourable Fred Kaufman, Q. C., Commissioner

RULING ON WHETHER OR NOT MICHAEL MICHALOWSKY WILL BE COMPELLED TO APPEAR AS A WITNESS

In the normal course of events, Commission counsel would have called Michael Michalowsky to testify in Phase IV of the inquiry. However, it was submitted at the time by Mr. Michalowsky's counsel that his client was too ill to testify, and I will return to the specific reasons later.

Some background information is in order.

Mr. Michalowsky is a 63-year old sergeant in the Durham Regional Police force who was the chief identification officer on December 31, 1984, when Christine Jessop's body was found. He testified at the preliminary inquiry of Mr. Morin on July 24, 1985, and he also provided evidence at the first trial in January 1986. Sgt. Michalowsky remained with the Identification Branch of the Durham Regional Police until some time after the first trial, at which point he was transferred to the Youth Bureau. He left the force in 1990 on leave-of-absence due to problems with his health.

Mr. Michalowsky has a long history of hypertensive coronary disease. In 1986 he underwent by-pass surgery to correct blocked arteries. In 1990 he spent 12 days in the Coronary Care Unit in Oshawa General Hospital with stress-induced coronary insufficiency, and later that year his physician, Dr. Roy Rowsell, stated (in an affidavit) that should his patient have to stand trial "this

stress factor in conjunction with his hypertension and coronary disease will put his personal health in great danger".

The trial to which Dr. Rowsell referred was on an indictment charging Sgt. Michalowsky with one count of perjury and two counts of obstructing justice, all related to his involvement and subsequent evidence in the proceedings against Guy Paul Morin. In particular, it was alleged that he lied when he testified that a notebook which he utilized was prepared at the time when the events occurred and that a cigarette butt which was tendered as evidence was a butt found near the victim's body, which allegedly it was not.

At the request of the Crown, the Ontario Provincial Police had investigated these incidents, and as a result of this investigation, Sgt. Michalowsky was charged with the offences set out above. He was committed for trial, but his counsel moved to have the charges stayed because, it was said, a trial would jeopardize his health.

The trial judge, O'Connell J., agreed, and this is what he said in part:

> The circumstances of the applicant's health in my view are such, and so compelling, as to fall within the test, that by compelling the accused to stand trial, would violate those fundamental principles of justice which underlie the community's sense of fair play and decency.
>
> Here there are exceptional circumstances, and to put him to trial would be an oppressive proceeding, because the risk is not worth taking.

> In my view no court should be put in the position to force a person to trial, where a psychologist states, personally, it is hard to imagine he can endure the process, or as the doctor states, the risk is not worth taking.
>
> Accordingly I would grant the stay as requested.

That was on November 12, 1991.

Subsequently, the defence sent a subpoena to Mr. Michalowsky for his testimony at the second trial, but once again his counsel submitted that his state of health was too precarious to testify.

Mr. Justice Donnelly agreed that Mr. Michalowsky was ill, but in view of "the gravity of the charge [against Mr. Morin], the fundamental importance of the right to full answer and defence, the defence right to assess the significance of evidence and its context ... and the potential utility of Sgt. Michalowsky's evidence" he considered it his "duty to proceed further in an attempt to make this evidence available to the Court". However, certain safeguards were ordered to ensure that "the evidence ... proceed in a calm and expeditious manner".

Subsequent to this ruling, Mr. Michalowsky testified at that trial on June 2 and 3, 1992, and excerpts from video tapes taken at the time were played in the course of this inquiry.

The Commission has in its possession Mr. Michalowsky's prior medical records, including those of cardiologists, psychologists, professors of anxiety disorders at the Clarke Institute, and his family physicians. These were forwarded by Commission counsel to a cardiologist chosen by the

Commission to give us an independent assessment of Mr. Michalowsky's present state of health. This cardiologist is Dr. Allan Gordon Adelman, an Associate Professor of Medicine at the University of Toronto, who practises at the Mount Sinai Hospital (where, amongst other things, he has been the director of the Cardiovascular Clinical Research Laboratory), as well as the Toronto General Hospital and the Sunnybrook Health Sciences Center. Dr. Adelman's report, together with his c.v., is attached to this decision.

As can be seen from the report, Dr. Adelman examined Mr. Michalowsky on July 28, 1997. The results are set out in detail in the report, and I content myself to cite the two key paragraphs:

> The real question is whether this man's cardiac status will permit him to testify. In order to assess this, Dr. Bhargava did a mental stress ECG on him in July, 1997. This involved writing an essay. Indeed, after five minutes he developed significant ST depression in the anterior lateral leads associated with ventricular premature beats consistent with acute ischemia. I would, therefore, concur with his current physicians, Dr. Jain and Dr. Bhargava that Mr. Michalowsky suffers from angina due to myocardial ischemia. Dr. Rowsell, his cardiologist in 1990 and his family physician Halam-Andres stated in letters to the court that testifying would put him at great danger and it might even lead to "fatal results" or "put him at danger physically". On the other hand, Dr. Loach felt he would be less stressed by testifying and resolving the issue. In fact, Mr. Michalowsky has stated a desire to testify if his health permits.
>
> I do not think that his treating cardiologist or myself can be certain whether or not Mr. Michalowsky would suffer an acute myocardial ischemia event while testifying. However, there is evidence that this is likely because he is a very anxious man who is quite depressed and who has myocardial ischemia with very little provocation. He could not complete the first stage of the Bruce protocol on a stress test and he had evidence of ischemia on a mental stress test carried out by Dr. Bhargava.

In my view this is not a risk we can impose. I realize that Brian Gover, a former Crown attorney who testified at these hearings, was of the view that Mr. Michalowsky was "faking" when he testified (with what appeared to be great difficulty) at the trial. Ms. McLean relied upon this evidence, together with the chronology of events (including the timing of Mr. Michalowsky's assertions of illness) in her submissions that he should be compelled to testify. However, the fact remains that there is incontrovertible evidence that he has coronary artery disease, and while Dr. Adelman suggests that coronary and left ventricular angiography, followed by angioplasty, may well "improve his functional capacity and allow him to testify before the inquiry", this is not something I can order. In fact, in fairness to Mr. Michalowsky, I must add at this point that he has made arrangements to have the first part of this procedure carried out at St. Michael's Hospital in Toronto, and the likely date is towards the end of November. Only then can his physicians decide whether or not to proceed to the second part, but I must note that this procedure was attempted once in the past but failed to succeed.

Ms. Joanne McLean forcefully argued that Mr. Michalowsky should be called. I respect her views, but I must bear in mind that this is not a trial, and this is not a case of ensuring that an accused has the opportunity to make full answer and defence, as was the case with Mr. Morin. We have already heard a good deal of evidence about Mr. Michalowsky's actions, about the second set of notes and certainly about the cigarette butt in question. We also have a transcript of his evidence and, in addition, a video of his testimony at trial. Given all of these circumstances, I will exercise my discretion and not issue a subpoena compelling Mr. Michalowsky to appear and testify.

6

Delivered this 28th day of October, 1997

The Honourable Fred Kaufman, Q.C.

The Commission on Proceedings Involving Guy Paul Morin
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Fax: (416) 325-2409
The Hon. Fred Kaufman, Q.C.
Commissioner

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L' hon. Fred Kaufman, c. r.
Commissaire

Ontario

June 18, 1997

VIA FAX AND MAIL

Mr. Jay Acton
Dienst Serrins, L.L.P.
233 Broadway, 18th Floor
New York, New York
10279

Dear Mr. Acton:

I am one of the counsel to the Commission of Inquiry on Proceedings Involving Guy Paul Morin. At the end of May our office contacted Mr. John Douglas to ascertain whether he was prepared to come to Canada to testify as a witness at the inquiry. On May 29, 1997 you contacted us via voice mail message on behalf of Mr. Douglas. Several weeks ago, we spoke at length. I advised you of the nature of the inquiry, and our desire that Mr. Douglas testify, at his convenience, during phase four, namely that part of the inquiry examining the investigation by the Durham Regional Police force that led to the arrest and prosecution of Guy Paul Morin.

Various parties to the inquiry regard Mr. Douglas' involvement in the investigation into Christine Jessop's murder to be significant to the issues raised during this phase-for example as explanatory of decisions made by the police during the investigation. The profiling also raises systemic issues of importance to the inquiry-for example what role should profiling have in conducting criminal investigations in the future?

You kindly advised me that you would be meeting with Mr. Douglas within a day, and would advise me whether he is prepared to come to Canada to testify. I have not heard further from you or Mr. Douglas, and have been unsuccessful in reaching you through several messages left with your office.

I enclose a copy of a summons signed by the Commissioner and directed to Mr. Douglas. In fairness, the summons is unenforceable in the United States, and is provided to you for informational purposes only. As I advised you, Mr. Douglas would be expected to testify for one to two days. The date of his appearance would be amended to accommodate Mr. Douglas' busy

schedule. As well, the Commission would be prepared to make travel and accommodation arrangements, at our expense, to facilitate Mr. Douglas' attendance.

I await your early response, since counsel for the parties with standing at the inquiry need to be advised whether the Commission will or will not be in the position to call Mr. Douglas as a witness. Since this is a public inquiry I am also required to disclose this correspondence and any response thereto.

Thank you in advance for your consideration in this regard.

Yours truly,

Mark J. Sandler
Associate Commission Counsel

COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN

HON. FRED KAUFMAN, C.M., Q.C., COMMISSIONER

COMMISSION COUNSEL

Austin M. Cooper, Q.C.	Counsel
Mary A. Sanderson	Associate Counsel (to 03/1997)
Mark J. Sandler	Associate Counsel
Maureen B. Currie	Associate Counsel (from 03/1997)

RESEARCH STAFF

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Christopher Sherrin	Consultant
Philip Downes	Researcher (to 12/1997)
Jana Mills	Researcher
Michelle Rumble	Researcher (to 06/1997)
Vincent Paris	Researcher (from 06/1997)
Kenneth Dekker	Researcher (from 02/1998)

ADMINISTRATIVE STAFF

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Elizabeth Brooker	Assistant Administrator
Simone Dholah	Receptionist
Krystina Krywoj	Library and Accounts Clerk
Marilyn McKendrick	Transcriber
Nicole Niles	Secretary
Isabelle Riser	Secretary
Olek Sydor	Supplies and Distribution Clerk
Margaret Thomas	Secretary
Dawn Yager	Transcriber

HEARING ROOM STAFF

Mary Bandiera	Registrar
Merv Buck	Court Services Officer
Carlyle Innis	Security Officer
Sam Lewis	Security Officer

AUDIO/VIDEO PRODUCTIONS (Von Valkenburg Communications)

Jim Mathews	Operator/Technician

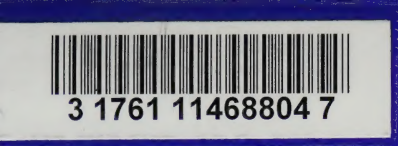
COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN

Parties Granted Standing

Applicant	Representative
Guy Paul Morin, Ida Morin & Alphonse Morin	James Lockyer Joanne McLean
Janet Jessop & Kenneth Jessop	Timothy S.B. Danson Stephen Reich Peter Danson
John Shephard	Edward L. Greenspan, Q.C. Glen F. Jennings
Bernie Fitzpatrick	Paul D. Stunt Gracie Romano Monica MacKenzie-Bolle
Michael Michalowsky	Bernard F. O'Brien
Durham Regional Police Association, David Robinet, Tom Cameron, Paul Nadeau & Jeffrey Hewitt	Ian J. Roland Lily I. Harmer Pamela J. Shime Students-at-law: Heather Bowie George Avraam Sona Advani Tamara L. Steinberg Caroline Carnerie
Durham Regional Police Services Board	David J.D. Sims, Q.C. Grant C. Currier
York Regional Police Association, Rick McGowan & David Neil Robertson	Barrie Chercover Ian J. Fellows
Regional Municipality of York Police Services Board	Steven O'Melia

Gordon Hobbs	Paul D. Stern
Leo McGuigan, Q.C. & Alex Smith	Earl J. Levy, Q.C.
Susan MacLean	Michelle Fuerst Alan D. Gold Lana Finney Michael Lacy Isabel Pargana
John D. Scott, Q.C.	Robert P. Armstrong, Q.C. Jane S. Bailey
Robert D. May	G. Gary McNeely, Q.C.
Mr. "X"	David M. Humphrey Brian H. Greenspan
Ministry of the Solicitor General and Correctional Services (Ontario), Stephanie Nyznyk & Norman Erickson	Dennis Brown, Q.C. John Zarudny Michael Fleishman May M. Cheng
Centre of Forensic Sciences	J. Bruce Carr-Harris M. Kate Stephenson
Ministry of the Attorney General	Thomas Marshall, Q.C. Fran D. Sayers
The Association in Defence of the Wrongly Convicted	Paul Bennett Paul Copeland Marlys Edwardh Melvyn Green Michael Lomer Kent Roach Peter Zaduk Assisted in written submissions by: Paul Burstein Elizabeth de Costa

	Peter Meier
	David Outerbridge
	Leslie Paine
	Brad Smith
Canadian Bar Association - Ontario	William J. Simpson, Q.C.
	Daniel J. Brodsky
	Paul Vesa
	Caroline Fineberg
	Paul Robertson
Ontario Crown Attorneys' Association	Stephen Skurka
	Robert Warren
	Anil Kapoor
	James Stribopoulos
	Marie Abraham
	M. Jane Fairburn Rodger
Criminal Lawyers' Association	Timothy R. Lipson
	David E. Harris
	Maureen Forestall
	Jack Gemmell
	Paul Layefsky
	John Sutherland


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